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PETITION NOT PRINTED

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 185

AUGUSTINE BALDONADO, PETITIONER,

vs.

CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED JUNE 7, 1960

CERTIORARI GRANTED JUNE 27, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 185

AUGUSTINE BALDONADO, PETITIONER,

vs.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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[fol. a]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

CR 3220

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO

Clerk's Transcript for Appeal of Defendant Augustine Baldonado

APPEARANCES:

For Plaintiff and Respondent: Roy A. Gustafson, District Attorney, Court House, Ventura, California. Stanley Mosk, State Attorney General, State Building, Los Angeles, California.

For Defendant and Appellant: John R. Danch, 3212 Loma Vista Road, Ventura, California.

[fol. 1] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF VENTURA

No. CR 3220

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO, Defendants.

INDICTMENT (Violation of § 187, Penal Code.)—Filed December 26, 1958.

The Grand Jury of the County of Ventura hereby accuses Elizabeth Ann Duncan, Luis Estrada Moya and Augustine Baldonado of a felony, to-wit, a violation of Section 187 of the Penal Code in that on or about November 17, 1958 they murdered Olga Duncan.

Dated this 26th day of December, 1958.
A true bill.

George E. Ruggel, Foreman of the Grand Jury of the County of Ventura, State of California.

The following are the names of witnesses examined before the Grand Jury: Emma Short, Rudolph Romero, [fol. 2] Diane Romero, Barbara Reed, Mrs. Harold Barnett, Sylvia Butler, Doreen Corraini, Augustine Beldonado, Luis Estrada Moya, Gordon Johnston, M.D., Mrs. Mary Ann Dowhower, Frank Duncan, Hal Hammons, Jr., Clarence Henderson, Virgil Payton.

[fol. 3] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF VENTURA

CR-No. 3220

THE PEOPLE OF THE STATE OF CALIFORNIA,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO

BENCH WARRANT

The People of the State of California, to any Peace Officer of the State of California.

An order having been made on the 26th day of December, 1958, by the Superior Court of the State of California, in and for the County of Ventura, that Augustine Baldonado, be arrested because of alleged violation of Section 187 of the Penal Code of the State of California.

You Are, Therefore, Commanded forthwith to arrest Augustine Baldonado and bring before said court, on the 30th day of December, 1958, 9:30 A.M.

By order of the Court.

Given under my hand with the seal of said Superior Court affixed this 26th day of December, 1958.

L. E. Hallowell, Clerk, by Stanley Robinson, Deputy Clerk.

STATE OF CALIFORNIA,
County of Ventura, ss:

Return

I Certify that I received the above warrant on 1-6, 1959, and served the same by arresting the above named defendant thereon at Ventura on 1-6 1959, and bringing him into court on 1-6-59.

Wm. E. Hill, Sheriff, by Lt. [name illegible], Deputy Sheriff.

[fol. 4] IN THE SUPERIOR COURT OF VENTURA COUNTY

Tuesday, December 30, 1958, 9:30 O'Clock A.M.

CR 3220

THE PEOPLE, etc.,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA, & AUGUSTINE BALDONADO

ARRAIGNMENT & APPOINTMENT OF COUNSEL

The District Attorney, defendant Elizabeth Ann Duncan, with her counsel, S. Ward Sullivan, and defendants Luis Estrada Moya and Augustine Baldonado, without attorneys, are present in Court.

Defendant Duncan is informed of her legal rights waives reading of the indictment, a copy of which is delivered to her, and at her request cause is continued until Jan. 6, 1959, at 2:00 P.M. for plea.

Defendant Moya is advised of his legal rights, whereupon, at his request, the Court appoints and assigns Nagao Fujita as counsel for said defendant.

Defendant Baldonado is informed of his rights and at his request the Court appoints John Danch, who is present, as attorney for Baldonado.

Cause as to Moya and Baldonado is thereupon continued until January 6, 1959, at 2:00 P.M. for further arraignment and plea.

[fol. 5] All defendants are remanded to the custody of the Sheriff.

[fol. 6] IN THE SUPERIOR COURT OF VENTURA COUNTY

Tuesday, January 6, 1959. 9:30 O'Clock A.M.

PLEAS OF NOT GUILTY & NOT GUILTY BY REASON OF INSANITY, ORDER APPOINTING ALIENISTS, ETC.

The District Attorney, defendant Elizabeth Ann Duncan, with her counsel S. Ward Sullivan, defendant Luis Estrada

Moya, with his attorney Burt Henson and defendant Augustine Baldonado, with his counsel John Danch, are present in Court.

The defendants are duly arraigned, state their true names to be as alleged in the Indictment on file herein, which is read and a copy thereof delivered to each defendant by the Clerk.

Thereupon, defendant Elizabeth Ann Duncan enters her plea of not guilty and not guilty by reason of insanity of the offense of violation of Section 187 of the Penal Code, as charged in the Indictment.

Pursuant to law, the Court appoints Doctors Louis R. Nash and Philip R. A. May, members of the staff of Camarillo State hospital to examine defendant as to her sanity [fol. 7] and to report their findings to the Court.

Cause as to defendants Moya and Baldonado is continued until January 13, 1959, at 9:30 A.M. for plea at request of their respective counsel.

Defendant Duncan at this time moves the Court for a change of venue from Ventura County to another County in the State of California for the purpose of trial.

Said motion is by the Court denied, without prejudice.

With both defendant Duncan and her counsel waiving statutory time, said cause as to defendant Duncan is set down for jury trial on Monday, February 16, 1959, at 10:00 A.M. and the Sheriff is ordered to summon 250 prospective jurors to be in attendance upon the Court at said time.

All defendants are remanded to the custody of the Sheriff.

[fol. 8] IN THE SUPERIOR COURT OF VENTURA COUNTY

Tuesday, January 13, 1959. 9:30 O'Clock A.M.

PLEAS OF NOT GUILTY & NOT GUILTY BY REASON OF INSANITY; ORDER APPOINTING ALIENISTS; AND ORDER SETTING CAUSE FOR TRIAL

The District Attorney, defendant Luis Estrada Moya, with his counsel, Burt Henson and defendant Augustine Baldonado, with his counsel, John Danch, present.

Cause comes regularly on at this time for receiving the plea of said defendants.

Thereupon, defendant Luis Estrada Moya enters his pleas of not guilty and not guilty by reason of insanity of the offense of violation of Section 187 of the Penal Code, as charged in the indictment.

Pursuant to law, the Court appoints Doctors Louis R. Nash, David R. M. Harvey and Donald S. Patterson as alienists to examine said defendant as to his sanity and to report their findings to the Court.

Defendant Augustine Baldonado regularly enters his pleas of not guilty and not guilty by reason of insanity of the offense of violation of Section 187 of the Penal Code, as charged in the indictment; and pursuant to stipulation, [fol. 9] Doctors Nash, Harvey and Patterson are appointed as alienists at examine defendant Baldonado as to his sanity.

Jury trial as to both defendants is thereafter set down for Monday, February 16, 1959, at 10:00 A.M., motions by defense counsel for a later trial date being by the Court denied.

[fol. 10] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

No. CR 3220

[Title omitted]

APPLICATION FOR REMOVAL OF ACTION—Filed January 8, 1959

Defendant Augustine Baldonado, by his attorney John R. Danch, hereby applies to the above entitled court for a removal of this action from the Court on the ground that a fair and impartial trial cannot be had in this County.

Notice is hereby given to the District Attorney that this application will be presented to the Court on Tuesday, January 13, 1959, at 9:30 A.M.

This application is made upon the affidavit of Augustine Baldonado, attached hereto, and upon the affidavits filed by Luis Estrada Moya.

Dated: January 12, 1959.

John R. Danch, Attorney for Augustine Baldonado, Defendant.

[fol. 11] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

AFFIDAVIT IN SUPPORT OF APPLICATION FOR REMOVAL OF ACTION

STATE OF CALIFORNIA,
County of Ventura, ss:

Augustine Baldonado, being sworn, says:

I am one of the defendants in this action.

On December 22, 1958, and December 27, 1958, the District Attorney of Ventura County released statements for publication. These statements are set out in the affidavit of S. Ward Sullivan, on file in this action. The statements, together with the extensive publicity surrounding this matter, have aroused passion and prejudice against me to such an extent that a fair trial cannot be had in this County.

On Tuesday, January 6, 1959, when procedings were had in this matter, the spectators openly demonstrated their hostility in the Courtroom.

Augustine Baldonado.

Subscribed and sworn to before me this 12th day of January, 1959.

John R. Danch, Notary Public in and for the County of Ventura, State of California.

[fol. 12] [File endorsement omitted]

AFFIDAVIT OF JACK R. MCHENRY IN OPPOSITION TO APPLICATION FOR REMOVAL—Filed January 13, 1959

STATE OF CALIFORNIA,
County of Ventura, ss:

Jack R. McHenry, being first duly sworn, deposes and says that:

I am the managing editor of the Ventura County Star-Free Press, a newspaper published in the City of Ventura, California.

I have examined the issues of the Ventura County Star-Free Press from December 20, 1958, to date and I can find no story, article or editorial quoting Roy A. Gustafson, District Attorney of the County of Ventura, as follows:

> "This crime," he declared, "is one of the most vicious and horrible in the annals of modern justice. Each new fact uncovered throughout the investigation has been more disgusting and shocking than the last.
>
> "It should serve as an object lesson to all persons who find it necessary to extend a gratuitous and wasted sympathy toward murderers—asking that they be spared their lives.
>
> "Nothing short of death could possibly be considered a just or a fitting penalty for the perpetrators of this crime against an innocent young mother-to-be."

Roy A. Gustafson did not make any such statement to me and I have no knowledge, information or belief that he made any such statement to anyone.

Jack R. McHenry, subscribed and sworn to before me this 12th day of January, 1959.

Harold J. Kelly, Notary Public in and for said County and State.

My commission expires June 26, 1962.

[fol. 13] [File endorsement omitted]

AFFIDAVIT OF ROY A. GUSTAFSON IN OPPOSITION TO APPLICATION FOR REMOVAL—Filed January 13, 1959

STATE OF CALIFORNIA,
County of Ventura, ss:

Roy A. Gustafson, being by me first duly sworn, deposes and says that:

I am the District Attorney of Ventura County. On or about December 21, 1958, I publicly made the following statement:

"The brutal, calculated, revolting killing for hire of Olga Duncan is one of a number of horrible crimes which have recently been committed in California. I simply cannot understand how some of our leaders, in the face of these events, can seriously contend that the death penalty is not appropriate punishment for the perpetrators of such a crime.

"Many persons contend that the death penalty does not deter murder. Frankly, I am sick of this illogical argument. Of course penalties do not completely deter crimes. Jail sentences do not completely deter drunken drivers, burglars, robbers or any other criminals and death penalties do not completely deter murderers. But that is no reason to dispense with penalties.

"Retaliation is a basic instinct of the human race. In civilized societies, the government takes over from the individual the job of retaliating against a wrongdoer. From biblical times, a life for a life has been recognized as just and fair.

"The alternative in California, a life sentence which permits a prisoner to be paroled in seven years, simply is insufficient retaliation. I hope the people of this state rise up against the propaganda drivel that has flooded us lately about the so-called evils of capital [fol. 14] punishment. They must demand that California retain the death penalty to deal with situations such as the Duncan case."

In that statement no mention was made of the defendants in the case of *People v. Elizabeth Duncan, et al.* I have never publicly declared my personal knowledge or belief of the guilt of the defendants or any of them. No statement ever made by me was calculated to arouse public passion and prejudice against the defendants or any of them.

Neither the following statement, nor anything resembling it, was ever made by me at any time:

> "This crime," he declared, "is one of the most vicious and horrible in the annals of modern justice. Each new fact uncovered throughout the investigation has been more disgusting and shocking than the last.
>
> "It should serve as an object lesson to all persons who find it necessary to extend a gratuitous and wasted sympathy toward murderers—asking that they be spared their lives.
>
> "Nothing short of death could possibly be considered a just or a fitting penalty for the perpetrators of this crime against an innocent young mother-to-be."

To the best of my information and belief, the publications concerning this case have not aroused public passion and prejudice against the defendants, or any of them, to the extent that a fair and impartial jury to try the defendants cannot be obtained in Ventura County.

Roy A. Gustafson, Subscribed and Sworn to before me this 12th day of January, 1959.

Franklin R. Greene, Notary Public in and for said County and State.

My Commission Expires Feb. 23, 1959.

[fol. 15] [File endorsement omitted]

AFFIDAVIT OF VOLNEY CUMMINS IN OPPOSITION TO APPLICATION FOR REMOVAL—Filed January 13, 1959

STATE OF CALIFORNIA,
County of Ventura, ss:

Volney Cummins, being by me first duly sworn, deposes and says that:

I am the Undersheriff of Ventura County. I was present in the court room on January 6, 1959, when the defendants, Duncan, Baldinado and Moya were in court.

I am familiar with the seating capacity of the court room and I have had experience in estimating the size of crowds of persons. I estimate that the number of persons seated and standing in the court room together with the number of persons who were standing in the hall unable to gain admittance to the court room did not exceed two hundred (200). The population of Ventura County is approximately 170,000.

I heard the report that a woman attempted to hit defendant Elizabeth Duncan with a purse. I made numerous inquiries of officers, newspapermen, spectators and others in an attempt to verify this report. The only person whose name was given to me as one who had reportedly seen the incident was William Lewis, investigator for S. Ward Sullivan, Attorney for the defendant Elizabeth Duncan.

Volney Cummins.

Subscribed and sworn to before me this 13th day of January, 1959.

Maxim E. Coutre, Notary Public in and for said County and State.

My Commission Expires Aug. 10, 1962.

[fol. 16] [File endorsement omitted]

AFFIDAVIT OF ROY A. GUSTAFSON IN OPPOSITION TO APPLICATION FOR REMOVAL—Filed January 13, 1959

STATE OF CALIFORNIA,
County of Ventura, ss:

Roy A. Gustafson, being by me first duly sworn, deposes and says that:

I have examined the affidavits attached to the applications for removal of the case of *People* v. *Elizabeth Ann Duncan, et al.* Not a single affidavit appears from any person stating that the declarant is biased and prejudiced against the defendants, or any of them, or that the declarant believes that the defendants, or any of them, are guilty or that the declarant believes that the defendants, or any of them, should be executed. Moreover, in none of the affidavits does the declarant identify by name any person who made any statement regarding the defendants.

I am not aware of any person in Ventura County who has stated that he could not act fairly and impartially as a juror in the trial of the defendants, or any of them.

It is a matter of common knowledge that newspapers and other media of communication publish reports about crimes that have occurred which are of interest to the public. I know of no rule of law which prohibits any law enforcement officer from disclosing facts to the media of communication. I know of no rule of law which imposes any censorship on media of communication with respect to publishing facts about a crime.

When the transcript of the Grand Jury hearing was filed with the Clerk of the Superior Court, the testimony of the witnesses before the Grand Jury became a matter of public record. There is no rule of law precluding the public from learning from the transcript what transpired before the Grand Jury. I have examined the exhibits attached to the affidavits filed with the applications for change of place of trial and can find nothing in the newspaper reports pub-[fol. 17] lished prior to the filing of the Grand Jury transcript which related the facts in nearly as great detail as

they are related in the transcript of the Grand Jury hearing. It is obvious that had not one fact been disclosed by any law enforcement officer prior to the filing of the Grand Jury transcript, the attitude of the public after the filing of the Grand Jury transcript would have been the same as it now is.

I do not know of my own knowledge the exact length of time that the Grand Jury deliberated before returning an indictment against the defendants, but assuming that it was fifteen minutes, I know of no rule of law which requires that the Grand Jury deliberate any particular length of time before returning an indictment. On the contrary, I am familiar with the case of *People* v. *Daugherty* (1953), 40 Cal. 2d 876 where the defendant, appealing from a verdict of a trial jury imposing a death penalty for murder, claimed "that the jury reached a verdict in so short a time that it must have been prejudiced". The Supreme Court of California said that

> "it may be noted that the jury took an hour and a quarter to reach its verdict on the first phase of the trial. While the record consists of some 1,274 pages, the defendant's only defense at the trial was, as above stated, that the defendant was so befuddled by alcohol and illness that he could not form an intent and was incapable of premeditation or deliberation. There was no question that defendant killed Florena and the evidence of torture and premeditation and that his mind was not so affected is adequate. Inasmuch, however, as there were no eyewitnesses to the killing, most of the record consists of the People's structure of a case based on circumstantial evidence. On the record we do not believe the time consumed in reaching the ver- [fol. 18] dict was so short as to indicate a failure to consider the evidence or of bias or prejudice or the denial of a fair trial."

The transcript before the Grand Jury was less than one-fifth as long as the transcript in the case of *People* v. *Daugherty*. Moreover, the Grand Jury had merely to determine whether the defendants should be tried in the Superior Court for murder and not whether they were

guilty or whether, if guilty, they should suffer the deat
penalty. I cannot remember any case during the time tha
I have been District Attorney where the Grand Jury de
liberated any longer between the time of the conclusion o
the evidence and returning the indictment than the Gran
Jury did in the present case.

The fact that newspapers and other media of commun
cation are entitled to publish facts about a crime and th
fact that members of the public may form or express opin
ions about the guilt of defendants are expressly recognize
in the law of California. Section 1076 of the Penal Cod
provides that "no person shall be disqualified as a juro
by reason of having formed or expressed an opinion upo
the matter or cause to be submitted to such jury, founde
upon public rumor, statements in public journals, circular
or other literature, or common notoriety; *provided*, it ap
peared to the court, upon his declaration, under oath o
otherwise, that he can and will, notwithstanding such a
opinion, act impartially and fairly upon the matters to b
submitted to him." I have no information indicating tha
it will be impossible to find twelve persons in Ventur
County who, despite any opinions they may have forme
from reading the newspapers, can and will act impartiall
and fairly upon the matters to be submitted to them a
jurors in this case.

My statement concerning the desirability of retaining th
death penalty in California is simply the opposite poin
[fol. 19] of view of the "widely known" opinion of Willia
A. Gilbert referred to in his affidavit. I know of no rule o
law which prohibits William A. Gilbert from urging th
abolition of the death penalty or which prohibits me fro
urging the retention of the death penalty.

My statement that the death penalty is appropriate fo
the perpetrators of the murder of Olga Duncan canno
prejudice the defendants. The law of California is suc
that the defendants are guaranteed a fair trial. If, afte
such a trial, the defendants are found not to have perp
trated the crime, they obviously will not be prejudiced an
my statement would be inapplicable to them. If, on th
other hand, they are found guilty of first degree murde
then the statement will apply to them. The fact that

was made before the taking of testimony before the trial jury is of no consequence. In any case involving murder where the prosecutor seeks the death penalty, the fact that he will do so is always disclosed before the trial jury is selected by reason of the questions asked of prospective jurors as to the entertainment of such conscientious opinions as would preclude their finding the defendant guilty and imposing the death penalty. Consequently, whether prospective jurors know that I will seek the death penalty as the appropriate punishment from reading the newspapers or from hearing me say so in court is immaterial.

I again deny, as I have already done in another affidavit, that I made any such statement as is attributed to me on page six of the affidavit of Burt Henson.

The affidavit of Burt Henson further states that "he has heard various comments from time to time from residents of Ventura County indicating prejudice toward certain persons of Spanish-Mexican descent." During my eight years as District Attorney, I have heard no such comments. I represent that hundreds of Mexicans have been tried by judges and juries in Ventura County and I am aware of not [fol. 20] a single case wherein any court has ever held that any such person did not receive a fair trial because he was a Mexican. Persons of Mexican descent constantly serve as jurors in Ventura County. Based on my experience, jurors of Ventura County are extremely conscientious and do not permit the race, sex, origin, nationality, religion, or color of a defendant to influence their verdicts.

I admit that I represented to the court that a trial of this case should be had within a thirty (30) day period following the return of the indictment and I based that representation upon section 1050 of the Penal Code which states that the "court shall set all criminal cases for trial for a date not later than thirty (30) days after the date of entry of the plea of the defendant." I also admit that I represented to the court that my client, the People of the State of California, is entitled to an early trial and I based that statement on section 681a of the Penal Code which states: "The welfare of the People of the State of California requires that all proceedings in criminal cases shall be heard and determined at the earliest possible time. It

shall be the duty of all courts and judicial officers and of all district attorneys to expedite the hearing and determination of all such cases and proceedings to the greatest degree that is consistent with the ends of justice."

Roy A. Gustafson, District Attorney, County of Ventura, State of California.

Subscribed and sworn to before me this 13th day of January, 1959.

Maxim E. Coutre, Notary Public in and for said County and State.

My Commission Expires August 10, 1962.

[fol. 21] [File endorsement omitted]

AFFIDAVIT OF ROY A. GUSTAFSON IN OPPOSITION TO APPLICATION FOR REMOVAL—Filed January 13, 1959

STATE OF CALIFORNIA,
County of Ventura, ss:

Roy A. Gustafson, being by me first duly sworn, deposes and says that:

On Page 7 of the affidavit of Burt M. Henson appears the statement that a newspaper article said: "Gustafson says Moya was using marijuana when he was arrested in the Duncan murder case." While the newspaper article was correctly quoted in the affidavit of Burt M. Henson, I made no such statement to anyone.

On the day following the publication of the article referred to, the same newspaper, the Ventura County Star-Free Press, published a statement saying that the earlier article was in error and that I had not made such a statement.

As far as I am aware, Moya was not using marijuana at the time he was arrested or at any time since 1956.

Roy A. Gustafson, District Attorney, County of Ventura, State of California.

Subscribed and sworn to before me this 13th day of January, 1959.

Maxine E. Coutre, Notary Public in and for said County and State.

My Commission Expires Aug. 10, 1962.

[fol. 22] [File endorsement omitted]

AFFIDAVIT OF JACK R. MCHENRY IN OPPOSITION TO APPLICATION FOR REMOVAL—Filed January 13, 1959

STATE OF CALIFORNIA,
County of Ventura, ss:

Jack R. McHenry, being first duly sworn, deposes and says that:

I am the Managing Editor of the Ventura County Star-Free Press, a newspaper published in the City of Ventura, California.

On December 22, 1958, the Ventura County Star-Free Press published in full the statement of District Attorney Roy A. Gustafson made the previous day calling for the retention of the death penalty in California.

No letters have been received to date by the Ventura County Star-Free Press agreeing with the statement made by District Attorney Gustafson. Several letters were received disagreeing with the statement of District Attorney Gustafson and three of those letters were published. Exhibit A, attached hereto and made a part hereof, sets forth these letters as published by the newspaper and the dates on which they were published.

Jack R. McHenry.

Subscribed and Sworn to before me this 9th day of January, 1959.

Harold J. Kelly, Notary Public in and for said County and State.

My Commission Expires June 23, 1962.

[fol. 23] EXHIBIT "A" TO AFFIDAVIT

December 24, 1958

Death Penalty

Editor, The Star-Free Press:

I was interested in the statements made by our district attorney, Roy Gustafson, concerning the death penalty and its administration in California which appeared in the Star-Free Press on December 22nd, on page one.

Our district attorney says, "Many persons contend that the death penalty does not deter murder. Frankly, I am sick of this illogical argument." On page 29 of the report of the sub-committee of the judiciary committee on capital punishment, published by the assembly of the state of California, is found this arresting conclusion, "It simply avers from statistical and theoretical considerations that capital punishment is no effective deterrent to crime."

Again the district attorney states, "Retaliation is a basic instinct of the human race. In civilized societies, the government takes over from the individual the job of retaliation against the wrong-doer. From Biblical times a life for a life has been recognized as just and fair." On page 30 of the above report is the following statement: ". . . one may hold to it (the death penalty) as a means of retribution on the theory that killers deserve to die. There is little question that such a view strongly motivates an adherence to the death penalty, regardless of whether it deters or not. One can easily understand this attitude, and even share in it when a horrible crime is committed. Such a view is widely prevalent and naturally so. But one must observe that it is a departure from the accepted principles of modern penology." It is true that retaliation is a basic instinct of the human race but it is also the most primitive instinct in the human race. Are we going to nurture our primitive instincts or mature them up to our existing level of civilization?

Mr. Gustafson cited the Mosaic "law of the Claw" as a justification of the death penalty. As any good Biblical or classical scholar could have told him the maxim of "an eye for an eye" was originally one of mercy. The Near Eastern

cultures were afflicted by terrible clan wars which often resulted in the annihilation of an entire family in retaliation for but a slight offense. The code decreed that only he who perpetrated a crime should be punished; and to a degree relative to the severity of the crime, it was meant to save lives, not destroy them.

If Mr. Gustafson is to forward his opinions via the front page of the paper it would seem to me that it is his duty as an attorney and a public servant to provide the public with substantial facts.

Robert D. Myers, 97 Third street, Moorpark.

December 30, 1958

Death Penalty

Editor, The Star-Free Press:

Mr. Roy Gustafson, the district attorney of Ventura county, finds himself unable to understand how, in the face of brutal events like the Duncan murder, "our leaders . . . can seriously contend that the death penalty is not appropriate punishment for such a crime." He is quoted in the newspapers as referring to such a contention as "drivel" and goes on: "Many persons contend that the death penalty does not deter murder. Frankly, I'm sick of this illogical argument."

Inasmuch as the brutal, coldly calculated murder of Mrs. Duncan was committed with the death penalty on our statute books, it is difficult to see how the district attorney can find in this event a reason for refuting those who contend that the death penalty does not deter. In point of fact, the preponderance of evidence is on the side of the failure of the death penalty to deter, but Mr. Gustafson does not appear to be interested in evidence.

The district attorney switches quickly from a discussion of deterents to his real reason for wanting capital punishment retained on the state books. He wants revenge: "Retaliation is a basic instinct of the human race. In civilized societies, the government takes over from the individual the job of retaliating . . ."

I am frankly troubled by the district attorney's views concerning "basic instincts" and "civilization." I know

of no professional psychologist who lists such a basic instinct. As for civilization, it strikes me that lowering ourselves to the level of Mrs. Duncan's murderers is anything but civilized. However, if we follow Mr. Gustafson's reasoning to its logical conclusion, we should inflict on the murderers the preliminary beatings and terror to which Mrs. Duncan was subjected, and toss their bruised and battered and possibly half-alive bodies in some shallow grave.

We must act through the agency of government, of course. Why not such retaliation? And why not make a public spectacle of the procedure in order to better express the "basic instinct" to which the district attorney refers and achieve the assertedly deterrent effect besides?

Because we (including the district attorney of Ventura county) would regard such action as degraded and uncivilized. Then why degrade ourselves respecting the fundamental act, namely the taking of a life (or lives), and why call this "civilized"?

Society best shows its regard for human life and most effectively teaches its members to respect human life when it refuses to take a life, even under the extreme provocation provided by murderers like those who killed Mrs. Duncan. This is the simple truth that somehow evades Mr. Gustafson. However, simple truths have long escaped those of us who substitute pejoratives like "drivel" for reasoned argument and carefully marshalled evidence.

Harry Girvetz, 242 Las Alturas road, Santa Barbara, Calif.

Editor's note: Mr. Girvetz is a professor of philosophy and teacher of courses in ethics at Santa Barbara college of the University of California.

January 3, 1959

Retribution!

Editor, The Star-Free Press:

Awake! all ye citizens of California. If we are to be humanly wise we must follow the absolute truth of our Great Realist. Let us see through his eyes, honor his reasoning, judge as he judges, and proclaim our "basic instincts": an eye for an eye, tooth for tooth and life for life!

Hail! Mighty Father of Retribution. Teach us to be realistic and bestow upon our moral conscious your magic password: "Drive". Show us the way according to the Gospel of "basic instinct". Lovely Olga took away the "light" of Mrs. Duncan's life and Mrs. Duncan returned evil for evil by taking Olga's life.

Oh, wise D. A., bless us with the rehabilitating power of retaliation as the human solution to our problems. Help us to reshape society in the image of Mrs. Duncan! Lead us on the path of your righteous indignation to the voting polls that we might express our anger and fear, our hate. Direct us to make Holy our statutes in the truth of what you believe is the nature of the human race; that we think, live, and breathe lower than the animals, for, the most savage of beasts are unlearned in the human characteristic of pure revenge!

Truly, with your light shining upon us . . . with you in the lead . . . we shall make the government our instrument of retaliation and change the law to read: "Purge by Liquidation." Hallelujah! Amen.

Question: If one human being is justified in taking the life of another human being, why has society outlawed the murderer and called murder a criminal act?

Answer: Murder is unlawful but capital punishment is retribution by law . . . to wonder further is illogical, unrealistic and drivel!

Bette Vorbeck, 601 Shady Lane, Ojai, Calif.

[fol. 24] IN THE SUPERIOR COURT OF VENTURA COUNTY

Tuesday, January 13, 1959. 9:30 o'clock, A. M.

MOTIONS FOR CHANGE OF VENUE

The District Attorney, defendant Luis Estrada Moya, with his counsel, Burt Henson, and defendant Augustine Ballonado, with his attorney, John Danch, present.

At this time said defendants move the Court for a change of venue, pursuant to Section 1033 of the Penal Code.

Said motion is argued by respective counsel, submitted and taken under advisement by the Court.

Cause is continued until January 15, 1959, at 10:00 A.M. for Court's ruling on said motion.

Defendants are remanded.

[fol. 25] IN THE SUPERIOR COURT OF VENTURA COUNTY

Thursday, January 15, 1959. 9:30 o'clock A. M.

ORDER DENYING MOTIONS FOR CHANGE OF VENUE

Deputy District Attorney W. J. Deem and the defendants Luis Estrada Moya and Augustine Baldonado, with their respective counsel, Burt Henson and John Danch, present.

Cause comes on at this time for hearing Court's ruling on said defendants' motions for change of venue.

Said motions for change of venue having heretofore been submitted to the Court for its consideration and decision and the Court having fully considered the same, and being fully advised, it is by the Court ordered that said motions be and the same are hereby denied as fully set forth in the signed order on file herein.

[fol. 25-a] IN THE SUPERIOR COURT OF VENTURA COUNTY

Tuesday, February 10, 1959. 9:30 o'clock A. M.

WITHDRAWAL OF PLEA OF NOT GUILTY & ORDER FOR SEPARATE TRIAL AS TO INSANITY & PENALTY ISSUES

The District Attorney and defendant Augustine Baldonado, with his counsel, John R. Danch, present. Cause comes on for further proceedings at request of said defendant.

At this time, by leave of Court defendant withdraws his plea of not guilty heretofore entered, whereupon, it is stipulated by defendant, his counsel and the District Attorney that the offense herein is murder in the first degree.

Defense counsel moves the Court for a separate trial on the issues of insanity and penalty, which motion is by the Court granted.

Jury trial for said issues is hereupon set down for Monday, April 6, 1959, at 10:00 A.M. as to defendant Baldonado, and it is ordered that 100 prospective jurors be summoned for said date.

Defendant is remanded.

[fol. 26] IN THE SUPERIOR COURT OF VENTURA COUNTY

Monday, April 6, 1959. 10:00 o'clock A. M.

TRIAL

Trial of the above entitled cause comes regularly on at this time, with defendant Augustine Baldonado, with his counsel, John Danch and District Attorney Roy Gustafson present.

By leave of Court, said defendant withdraws his plea of not guilty by reason of insanity and enters his plea of guilty, of the offense charged in the indictment, heretofore stipulated to be first degree murder.

Counsel begin with the impanelment of a jury.

It is stipulated that the Court may inquire of the prospective jurors as to their attitude on the death penalty.

Counsel discuss points of law in the absence of the prospective jurors and defendant.

At the hour of 12:05 P.M., a recess is taken until the hour of 2:00 P.M. this date.

2:00 O'clock P.M.

[fol. 27] CR 3220

THE PEOPLE, etc.,

vs.

ELIZABETH ANN DUNCAN, AUGUSTINE BALDONADO, *et. al.*

FURTHER TRIAL

Trial is resumed in the above cause, with the District Attorney and defendant, with his counsel present. Counsel continue with the impanelment of a jury and thereafter

a jury consisting of the following 12 persons is regularly impaneled and sworn, to-wit:

Bernice Clerk, Urban Joe Berg, Phyllis E. Beesley, Marvin L. Stearns, Ruth E. Garrison, Cleo Bashor, Robert W. Tyrell, Margaret M. Dodds, Robert A. Houle, Claudia I. Jordan, R. E. Doerner and DeLois Greer.

Good cause appearing therefor, Frank Oliver is sworn as an alternate juror.

At the hour of 5:15 o'clock P. M., the jury is admonished and a recess taken until April 7, 1959, at 10:00 A.M.

[fol. 28] IN THE SUPERIOR COURT OF VENTURA COUNTY

Tuesday, April 7, 1959. 9:30 O'Clock A.M.

FURTHER TRIAL

Trial of the above cause is resumed at this time, with the District Attorney, defendant, Augustine Baldonado, with his counsel, jury and alternate juror present.

The District Attorney makes an opening statement at this time.

Sylvia Mary Butler, called by the People, is sworn and testifies.

A photograph of Olga Duncan is received in evidence as People's Exhibit B-1.

It is stipulated that the reporter's transcripts of the Grand Jury proceedings of December 26, 1958, and of the Elizabeth Duncan trial of February 26, 1959, are true and correct copies, whereupon, the testimony therein of Augustine Baldonado is read into the record of the District Attorney.

A map of Ventura County is received as People's Exhibit B-2.

[fol. 29] Virgil L. Payton, called by the prosecution, is sworn and testifies.

Photograph of bend in highway, with cars to left and group of men on right, is received as People's Exhibit B-3.

Photograph of white highway marker ("Mile 6.9") is received as B-4. (People's)

Photograph of ditch and culvert is received as People's Exhibit B-5.

The jury is excused while counsel discuss points of law.

Photograph of body lying in grave is marked as People's Exhibit B-6 for identification.

Another photograph of body in grave is marked as People's B-7

Photograph of skull of Olga Duncan is marked as People's B-8 for identification.

The jury returns and Mr. Payton resumes the stand for further direct examination.

People's exhibits B-7 and B-6, heretofore marked for identification, are received in evidence.

The People rest.

Mr. Danch makes an opening statement at this time on behalf of the defendant.

Desire De Porter, called by the defense, is sworn and testifies.

At the hour of 12:00 o'clock noon, a recess is taken until the hour of 2:00 P.M. this date, after the jury is duly [fol. 30] admonished.

2:00 O'Clock P. M.

CR 3220

THE PEOPLE, etc.,

vs.

ELIZABETH ANN DUNCAN, ET. AL.

FURTHER TRIAL

Trial in the above cause is resumed at this time, with the District Attorney, defendant Augustine Baldonado, with his counsel, jury and alternate juror present.

Joseph B. Glaser, William A. Gilbert, Mike Loza, Sophia Baldonado, Carmen Baldonado, and William Dwayne Isom, called by the defendant, are sworn and testify.

At the hour of 3:25 P.M., the jury is admonished and a recess taken until April 8, 1959, at 10:00 A.M.

[fol. 31] IN THE SUPERIOR COURT OF VENTURA COUNTY

Wednesday, April 8, 1959. 10:00 O'Clock A.M.

FURTHER TRIAL

Trial of the above entitled cause is resumed at this tim with the District Attorney, defendant Augustine Bald nado, with his counsel John Danch, jury and alterna juror present.

The Court at this time orders that no photographs recordings shall be taken while the Court is in session.

Dr. David R. M. Harvey, Onorinda Jones, Dr. A. L Mont Smith and Joseph A. Spangler, called by defen counsel, are sworn and testify.

The District Attorney's motion to strike certain portio of Mr. Spangler's testimony is granted.

At the hour of 12:05 P.M., the jury is admonished a a recess taken until the hour of 1:45 P.M. this date.

CR 3220

THE PEOPLE, etc.,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO

FURTHER TRIAL

[fol. 32] Trial of the above cause is resumed at this tim with the District Attorney, defendant Augustine Bald nado, with his counsel John Danch, jury and alterna present.

Joseph A. Spangler resumes the stand for further dire examination.

Mr. Danch's motion to strike certain portions of M Spangler's testimony is by the Court granted.

Defense counsel's motion to strike a statement ma by the District Attorney is denied.

The District Attorney's motion to strike a portion Mr. Spangler's testimony is granted.

The defendant rests.

By leave of Court, the prosecution is allowed to reopen its case in chief, whereupon, Thomas B. Osborne is called and testifies after being duly sworn.

A J. C. Higgins .22 caliber pistol, with handle broken off, model 88 and serial No. 7081, is received as People's Exhibit No. 9.

The People rest, but are again allowed to reopen their case and Ventura County Juvenile file No. 2374 (certified copy thereof) is received as People's Exhibit No. 10.

Both parties rest.

The cause is argued by respective counsel and at the hour of 5:05 P.M., the jury is admonished and a recess taken until April 9, 1959, at 10:00 A.M.

[fol. 33] IN THE SUPERIOR COURT OF VENTURA COUNTY

Thursday, April 9, 1959. 10:00 o'clock A. M.

FURTHER TRIAL

Trial of the above entitled cause is resumed at this time, with the District Attorney, defendant Augustine Baldonado, with his counsel John Danch, jury and alternate, present.

At this time the Court instructs the jury and at the hour of 10:06 A.M., the jury retires in charge of the bailiff to consider its verdict.

The jury returns into Court at 12:00 o'clock noon.

12:00 O'clock Noon

CR 3220

THE PEOPLE, etc.,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO

FURTHER TRIAL

Trial of the above entitled cause is resumed at this time, with District Attorney, defendant Augustine Baldonado, with his counsel, John Danch, jury and alternate, present.

The Court inquires of the jury if they have agreed u
[fols. 34-35] a verdict and the jury states that they
agreed upon a verdict, to-wit:

(It is stipulated that the verdict may be read back
the Clerk before being recorded)

"In the Superior Court of the State of Cali[f]ornia
and for the County of Ventura

No. CR 3220

The People of the State of California, Plaintiff

vs.

Elizabeth Ann Duncan, Luis Estrada Moya, and
Augustine Baldonado, Defendants

Verdict

We the jury impaneled to try the above-entitled ca
fix the penalty of the defendant, Augustine Baldon
for the murder in the first degree of Olga Duncan at de

Dated this 9th day of April, 1959.

Robert W. Tyrrell, Foreman of the Jury.

The jury is polled by the Clerk and each juror st
that said verdict is his or her verdict.

The jury is thereupon discharged.

Pronouncement of judgment and sentence in said ca
is set for April 14, 1959, at 9:30 A.M. and defendan
remanded.

[fol. 36] In the Superior Court of Ventura Count

Tuesday, April 14, 1959. 9:30 o'clock A. M.

Order Denying Motion for New Trial

The District Attorney and defendant Augustine Ba
nado, with his counsel, John R. Danch, are present
Court.

Defense counsel at this time moves the Court for a
trial, which motion is duly argued by respective coun
submitted and by the Court denied.

The Court thereupon refuses to exercise his powers under Section 1181 (7) of the Penal Code, whereupon, the following proceedings were had:

CR 3220

THE PEOPLE OF THE STATE OF CALIFORNIA,

vs.

ELIZABETH ANN DUNCAN, et. al.

JUDGMENT ON CONVICTION

District Attorney Roy A. Gustafson, and the defendant Augustine Baldonado, with his counsel John R. Danch, are present in court. The above entitled cause comes regularly on at this time for pronouncing judgment against the defendant.

[fols. 37-42] The defendant having heretofore entered his plea of guilty of the crime of first degree murder and the penalty for said offense having thereafter been fixed at death by a jury, he is duly arraigned for judgment, shows no legal cause why judgment should not be pronounced against him, and it is therefore ordered, adjudged and decreed that the said defendant be punished by being put to death by the administration of a lethal gas.

It is further ordered, adjudged and directed that the said defendant be taken by the Sheriff of the County of Ventura to the Director of Corrections at San Quentin, California.

The defendant is remanded to the custody of the Sheriff.

[fol. 43] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

OBJECTIONS TO CLERK'S TRANSCRIPT—Filed May 27, 1959

(Baldonado Case)

To the Honorable Charles F. Blackstock, Judge of the Superior Court in and for the County of Ventura:

Pursuant to rule 35 (c) of the Rules on Appeal the Plaintiff objects to the Clerk's Transcript on the ground

that it omits any reference to the change of plea by defendant Augustine Baldonado from "not guilty and not guilty by reason of insanity" to "not guilty by reason of insanity" and it further omits any reference to the order changing the date of trial from February 16, 1959, to April 6, 1959.

Plaintiff respectfully requests the correction of the [fol. 44] Clerk's Transcript to comply with rule 33 of the Rules on Appeal requiring that where "a judgment of death has been rendered and an appeal is taken automatically as provided by law, the entire record of the action shall be prepared."

DATED: May 27, 1959

Respectfully submitted, s/ Roy A. Gustafson, District Attorney, Attorney for the Plaintiff.

[fol. 45] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

[Title omitted]

OBJECTIONS TO REPORTER'S TRANSCRIPT (Baldonado Case)—May 27, 1959

To the Honorable Charles F. Blackstock, Judge of the Superior Court in and for the County of Ventura:

Pursuant to rule 35 (c) of the Rules on Appeal the Plaintiff makes the following requests for corrections in the Reporter's Transcript:

1

Page 46, line 2, strike "petulant".

2

Page 47, line 1, change "any" to "in a".

3

Page 56, line 22, change "phase" to "faze".

[fol. 46] 4

Page 175mm., line 22, change "views" to reviews".

5

Page 350, line 23, change "cause" to "call".

6

Page 401, line 9, change "bell" to "tell".

7

Page 403, line 19, change "kill" to "kills".

8

Page 416, line 5, change "stold" to "stole".

9

Page 420, line 5, change "says" to "does".

10

Page 423, line 7, change "grude" to "grudge".

11

Page 428, line 3, change "yes" to "yet".

12

Page 455, line 19, change "that me not to work" to "that to me not to walk".

13

Page 458, line 14, change "he" to "I".

14

Add to the transcript the portion of the proceedings wherein Augustine Baldonado changed his plea from "not guilty and not guilty by reason of insanity" to "not guilty by reason of insanity" at which time the trial date of his case was changed from February 16, 1959, to April 6, 1959. Dated: May 27, 1959.

[fol. 47] Respectfully submitted, Roy A. Gustafson, District Attorney, Attorney for Plaintiff

[fol. 48] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

ORDER CORRECTING CLERK'S TRANSCRIPT (Baldonado Case)—May 28, 1959

The proposed Objections to Clerk's Transcript and Objections to Reporter's Transcript having been presented to the Court, the Court orders that the said transcripts be corrected by adding to them the proceedings of February 10, 1959, and that the Reporter's Transcript be further corrected by making the changes as shown in said Objections.

Seal.

[fol. a] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

No. CR 3220

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO, Defendant

Clerk's Supplemental Transcript as to Defendant, Augustine Baldonado

APPEARANCES:

For Plaintiff and Respondent: Roy A. Gustafson, District Attorney, Court House, Ventura, California.

For Defendant and Appellant: John R. Danch, Attorney At Law, 3212 Loma Vista Road, Ventura, California.

[fol. 1] [File endorsement omitted]

AFFIDAVIT OF FLOYD K. GRESSETT, IN SUPPORT OF APPLICATION FOR REMOVAL—Filed January 13, 1959

STATE OF CALIFORNIA,
County of Ventura, ss:

Floyd K. Gressett, being first duly sworn, deposes an says that:

I am the duly appointed and acting Minister for th Avenue Community Church located in the City of Ventur County of V. tura, California;

Since the incarceration of Luis Moya and the charg filed against him for the death of Olga Duncan, I ha served as the spiritual adviser and minister to Luis Moy who first expressed the desire that he be allowed to consu with me.

It is known among my congregation and other acquain ances of mine, that I am acting as a minister to defenda Luis Moya. Consequently, people in my congregation an other residents of Ventura County have discussed the ca with me and have expressed sentiments suggesting th they were prejudiced against the defendants in this case a result of the notoriety given the case by newspapers an by certain public officials charged with the investigati and prosecution of the case. Others have expressed t sentiment that those accused would not receive a fair an impartial trial because of the wide notoriety given in t newspapers and statements by public officials charged wi the prosecution and investigation.

Floyd K. Gressett.

Subscribed and sworn to before me this 10th day January, 1959.

Burt M. Henson, Notary Public in and for said Coun and State.

[fol. 2] [File endorsement omitted]

AFFIDAVIT OF WILLIAM A. GILBERT IN SUPPORT OF APPLICATION FOR REMOVAL—Filed January 13, 1959

STATE OF CALIFORNIA,
County of Ventura, ss:

I, William A. Gilbert, being first duly sworn, depose and say that:

I am the duly appointed and acting Rector of St. Paul's Episcopal Church, Ventura, California, and have been acting in that capacity for 8½ years. At one time in my life, I served as Chaplain to Washington State Prison at Walla Walla, Washington. I have made public my personal views about abolition of the death penalty on many occasions.

Since my personal views on the abolition of capital punishment and my experience as a prison chaplain are widely known in the Ventura County area, many people have talked to me concerning that subject. Since the inception of the case involving the death of Olga Duncan, many persons who are residents of Ventura County have expressed their opinions to me concerning the case. Some of the persons with whom I have talked concerning the case have expressed the opinion that they had prejudged the case and that there was no question in their minds but that those charged with the death of Olga Duncan should be sentenced to death. Many of these residents of Ventura County have stated to me that there is no need of any trial or court process in this case because of the overwhelming evidence as reported by newspapers and public officials connected with the investigation of the Duncan case. Many other residents of Ventura County with whom I have discussed the Duncan case, have stated to me that the vast notoriety given this case by public officials and by newspapers had prejudiced the right of the accused to a fair and impartial trial in Ventura County.

William A. Gilbert.

Subscribed and sworn to before me this 9th day of January, 1959.

Burt M. Henson, Notary Public in and for said County and State.

[fol. 3] DECLARATION OF DONALD L. BENTON IN SUPPORT OF APPLICATION FOR REMOVAL

Declaration

I, Donald L. Benton, make the following declaration:

I am an attorney at law, admitted to practice in the Sate of California, and a resident of the City of San Buenaventura, County of Ventura, State of California.

Within the scope of my rather extensive non-legal acquaintance, the matter of People vs. Duncan, Baldonado and Moya is the most widely discussed criminal case in Ventura County since January 1, 1951. I have been drawn into a discussion of the case at all social functions I have attended since the case's inception. I have heard it discussed at service club meetings, directors' meetings, luncheon meetings, etc.

At no time have I observed any reluctance on the part of anyone discussing the case to state that the defendants are guilty. I have heard innumerable statements that the defendants should be executed. I have never heard any person state that he or she did not yet have an opinion regarding the guilt of the accused.

At various times I have pointed out that such opinions are founded on newspaper releases issued by law enforcement agencies, which were not necessarily accurate or complete. Persons so accused have admitted the truth of the charge, but have in substance stated that "They better not let me on the jury—I'd hang them."

I have further pointed out to persons expressing such opinions that this case, particularly with the news release regarding the death penalty which was issued before the Duncan indictment, is an example of the evils of trying a case in the newspapers. The logic of my argument was conceded, but at no time was I able to persuade anyone to change his or her opinion, or even to withhold judgment.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 9th 1959, at Ventura, California.

Donald Benton.

[fol. 4] AFFIDAVIT OF DAVID E. FLYNN IN SUPPORT OF APPLICATION FOR REMOVAL

Affidavit

STATE OF CALIFORNIA,
County of Ventura, ss:

David E. Flynn, being first duly sworn, deposes and says:

I live at 275 E. Highland Drive, Camarillo, County of Ventura, California;

Prior to January 5, 1959, I was the duly elected Judge of the Justice Court of the Moorpark-Camarillo Judicial District, County of Ventura, California;

On or about January 4, 1959, a very dear friend of mine and a resident of the County of Ventura came to my home at 275 E. Highland Drive, Camarillo, and discussed with me the pending charges against Elizabeth Duncan, Luis Moya and Augustine Baldonado. He stated to me in substance that everyone connected with that case should be summarily exterminated. He expressed dissatisfaction with the fact that the accused should be given the benefit of court process. He stated that he could not understand why an attorney would represent one of the accused. He further stated that he was intending to consult one of defense counsel as a private attorney, but would not do so since that particular attorney was acting as defense counsel in this case.

I stated to this man that with my background as a Judge of the Justice Court, I felt that everyone was entitled to the processes of the court and to a fair and impartial trial no matter who they were or what they were charged with. I further stated that all persons were entitled to counsel and that when counsel is appointed by the court, he is obligated to serve as defense counsel unless he has some good valid reason for not doing so. I pointed out to him that the defense counsel now appointed apparently had no valid reason for declining acceptance of the appointment and that therefore he was obligated to serve. I stated that anything less than this American tradition of a fair and impartial trial would be the "lynch law".

[fol. 5] This man then stated to me that the "lynch law" should be applied in this case and that defense counsel

should withdraw from the case. He stated that it would "hurt" one particular defense counsel in his law practice if he continued to serve as defense counsel. This man further stated that he had talked to twelve other persons in the Oxnard-Camarillo area and that each of the twelve other persons felt exactly the same way he did about the case.

David E. Flynn.

Subscribed and sworn to before me this 9th day of January, 1959.

Burt M. Henson, Notary Public in and for said County and State.

[fol. 6] AFFIDAVIT OF ALBERT T. BLANFORD IN SUPPORT OF APPLICATION FOR REMOVAL

STATE OF CALIFORNIA,
County of Ventura, ss:

Albert T. Blanford, being first duly sworn, deposes and says that:

I am a resident of the City of Ventura, County of Ventura, State of California;

I am an Attorney at Law licensed by the State of California and maintain an office for the purpose of practicing law at 2408 East Main Street, Ventura, California. The fact that I am an attorney is known among my friends and acquaintances.

Since the commencement of the investigation involving the death of Olga Duncan, many of my friends and acquaintances who are residents of Ventura County have discussed this case with me. Practically all who have discussed the Duncan case with me have expressed one or the other of the following opinions:

1. That those accused of causing the death of Olga Duncan were guilty and should be sentenced to death.
2. That the widespread notoriety given this case by newspapers, plus the statements of public officials charged

with the investigation of this case, have prejudiced the right of the accused to a fair and impartial trial.

Albert T. Blanford.

Subscribed and sworn to before me this 9th day of January, 1959.

Burt M. Henson, Notary Public in and for said County and State.

[fol. 7] AFFIDAVIT OF DAVID R. DRAPEAU IN SUPPORT OF APPLICATION FOR REMOVAL

STATE OF CALIFORNIA,
County of Ventura, ss:

David R. Drapeau, being first duly sworn, deposes and states that:

I am a resident of the City of Ventura, County of Ventura, State of California. I am an Attorney at Law licensed to practice by the State of California, and maintain an office for the purpose of practicing law at 736 East Main Street, Ventura, California. The fact that I am an attorney is known among my friends and acquaintances.

Since the commencement of the investigation involving the death of Olga Duncan, many of my friends and acquaintances who are residents of Ventura County have discussed this case with me. Practically all who have discussed the Duncan case with me have expressed one or the other of the following opinions:

1. That those accused of causing the death of Olga Duncan were guilty and should be sentenced to death.
2. That the widespread notoriety given this case by newspapers, plus the statements of public officials charged with the investigation of this case, have prejudiced the right of the accused to a fair and impartial trial.

David R. Drapeau.

Subscribed and sworn to before me this 9th day of January, 1959.

Burt M. Henson, Notary Public in and for said County and State.

[fol. 8] AFFIDAVIT OF BURT M. HENSON IN SUPPORT OF APPLICATION FOR REMOVAL OF ACTION

Burt M. Henson, being first duly sworn, deposes and states as follows:

I am an Attorney at Law licensed to practice law in the State of California and maintain an office for the purpose of practicing law at 65 South Palm Drive, Camarillo, California. Prior to January 1, 1958, I served in the office of the District Attorney of Ventura County as a Deputy District Attorney. My duties as Deputy District Attorney primarily involved the investigation and prosecution of criminal cases as distinguished from civil cases. This experience was known by my personal friends and acquaintances.

The case involving the alleged disappearance and death of Olga Duncan and the case involving an alleged fraudulent annulment obtained by Elizabeth Duncan first came to my attention through newspaper articles, television and radio broadcasts. Almost immediately from the time these [fol. 9] cases became public, they have become "conversation pieces". Practically all of my personal friends, family and acquaintances discussed this case with me. Practically all the residents of the County of Ventura who discussed this case with me expressed some opinion based upon newspaper and television and radio reports and based upon statements may by public officials charged with the investigation and prosecution of the case. The vast majority of opinions expressed were in substance that those accused were guilty and should be summarily executed, that this was the worst case imaginable, that the accused were nothing more than animals and should be disposed of accordingly.

In conversations with my friends and acquaintances, the accused were referred to as "Dirty Bastards", "Lousy Sons of Bitches" and other vile epithets. Other opinions expressed were in substance that any prospective jurors would be prejudiced as a result of the wide notoriety given this case and as a result of the statements of public officials involved in the investigation and prosecution of the case. Only one man who is eligible for jury duty with whom I talked expressed the opinion that he would endeavor to

keep an open mind on the case but stated "I hope I am not called upon for jury duty in this case".

On or about December 30, 1958, in the late afternoon, I was notified by the Clerk of the Superior Court that I had been appointed by Judge Blackstock to represent Luis Moya in the action. After coming home from work, I informed by family of the appointment. My eleven year old step-daughter stated: "What are you going to do that for? That's no case". After the fact of my appointment to represent Luis Moya became public, many of my friends and acquaintances joked with me about it and one friend jokingly stated: "How lucky can you get!"

[fol. 10] On or about January 6, 1959, I appeared in the Courtroom of the above entitled court. The purpose of the appearance was for the arraignment of the above named defendants. The time set for the arraignment was 2 P.M. I arrived at the courthouse at approximately 1:15 P.M. for the purpose of conferring with defendant Luis Moya before the arraignment At 1:15 P.M., all of the spectator seats in the courtroom were filled and other spectators were standing to the rear of the courtroom. I conferred with defendant Luis Moya in the Ventura County Jail which is located on the second floor on the west end of the courthouse. After conferring with Luis Moya for approximately 20 minutes, I proceeded toward the courtroom which is located in the middle of the courthouse on the second floor. The hallway which lead from the jail to the courtroom wherein the arraignment proceedings were scheduled is approximately 15 to 20 feet wide near the entrance to the courtroom. The hallway at the entrance to the courtroom was blocked by spectators and another attorney and myself were forced to shoulder our way through the spectator crowd.

I had to gain entrance to the courtroom through a side door which leads into the Judge's Chambers. The courtroom was filled to capacity including all standing room in the spectator section. Attached hereto as Exhibit 1 is the January 7, 1959 issue of the Oxnard Press Courier which contains a photograph of the condition of the courtroom at the time of the arraignment. The number of persons comprising the crowd was estimated to be 1000 as reported in the January 7, 1959 issue of the Los Angeles Times, a copy of which is attached hereto as Exhibit 2.

Exhibit 2 termed the crowd as "hostile" and reported that "a middle aged woman aimed a smashing blow at her (defendant Elizabeth Duncan) with her purse."
[fol. 11] At the time of the arraignment, Counsel for defendant Elizabeth Duncan entered a plea of not guilty by reason of insanity. At this point, the spectator crowd uttered a distinctly audible "Ohhhh". The court set the trial for defendant Elizabeth Duncan on February 16, 1959 at 10 A.M. based upon the representation of the District Attorney that a trial must be had within a thirty day period following return of the indictment. Defendant Elizabeth Duncan waived time for trial within the represented 30 day period.

The Court then inquired of affiant as counsel for defendant Luis Moya whether or not February 16, 1959 was agreeable for a joint trial of all defendants. Affiant objected to the early trial date in view of the prejudice against the defendants displayed by the courtroom spectators. When affiant suggested that the trial be set for the middle of March, the spectator crowd in the courtroom again uttered a distinctly audible "Ohhhh".

Affiant believes and thereon alleges that there is widespread and deep-seated prejudice against the defendants in the above entitled case. Affiant believes and thereon alleges that a primary reason for the existing prejudice is the fact that certain public officials made certain public statements concerning the above entitled case. Some high ranking public officials publicly expressed their opinions concerning the case. Other public officers released information to the press and other public media concerning the investigation. Many of such statements were made before any legal tribunal had heard any evidence. Many of such statements divulged information which would not have in any way constituted legal evidence in a trial. The statements of opinion published would probably have been classified as "prejudicial misconduct" if stated in a court of law. Affiant does not doubt the personal sincerity of these public officers. Affiant believes these public officers to be men of personal integrity and honesty. Affiant, however, does believe and thereon alleges that these public [fol. 12] officers became "carried away" and clearly overstepped the bounds of legal propriety and discretion in

making such public statements and in so doing, contributed materially to the prejudice against the defendants which now exists.

Roy A. Gustafson is the duly elected and acting District Attorney for the County of Ventura. He has served in that capacity for approximately 8 years and is well informed as to his duties and responsibilities with respect to the public office he holds.

In the December 22, 1958 issue of the Ventura County Star-Free Press, a copy of which is attached hereto as Exhibit 3, Roy A. Gustafson caused to be published a statement which contained among other matters, the following:

"The brutal, calculated, revolting killing for hire of Olga Duncan is one of a number of horrible crimes which have recently been committed in California. I simply cannot understand how some of our leaders, in the face of these events can seriously contend that the death penalty is not appropriate punishment for the perpetrators of such a crime. . . . Retaliation is a basic instinct of the human race. . . . From biblical times, a life for a life has been recognized as just and fair."

The statement is printed in full on Page 1 of Exhibit 3. The same statement in full appeared in the December 24, 1958 issue of the Oxnard Press Courier on page 15, a copy of said issue is attached hereto as Exhibit 4.

These statements were published before the case was ever presented to the Grand Jury of Ventura County for consideration. The District Attorney is legal counsel for the Grand Jury and Roy A. Gustafson presented the facts of the above entitled case to the Grand Jury for consideration on December 26, 1958. As reported in the December 27, 1958 issue of the Ventura County Star-Free Press, the Grand Jury returned indictments against the above named defendants after deliberating only 15 minutes. A [fol. 13)] copy of the December 27, 1958 issue of the Ventura County Star-Free Press is attached hereto and made a part hereof as Exhibit 5. As reported in the December 27, 1958 issue of the Oxnard-Press Courier, a copy of which is attached hereto as Exhibit 6, the Grand Jury deliberated only 12 minutes before returning an indictment for murder against all three of the above named

defendants. The December 27, 1958 issue of the L
Angeles Times, a copy of which is attached hereto
Exhibit 7 estimated the time for Grand Jury deliberati
at 15 minutes. Affiant believes that 12 to 15 minutes deli
eration by a Grand Jury considering 9 hours of testimo
and 3 defendants is a very short time. Affiant believ
that this fact illustrates the effect of the statements
the District Attorney.

Affiant is informed and believes and thereon alleges th
in an earlier Edition of the December 27, 1958 issue of t
Ventura County Star-Free Press, there was published
statement by Roy A. Gustafson, referring to the above e
titled case as follows:

"This crime," he (Gustafson) declared, "is one of t
most vicious and horrible in the annals of modern justic
Each new fact uncovered throughout the investigation h
been more disgusting and shocking than the last.

"It should serve as an object lesson to all persons w
find it necessary to extend a gratuitous and wasted sy
pathy toward murderers—asking that they be spared the
lives.

"Nothing short of death could possibly be considered
just or a fitting penalty for the perpetrators of this crim
against an innocent young mother-to-be."

In the December 30, 1958 issue of the Ventura Coun
Star Free Press, a copy of which is attached hereto
Exhibit 8, on page 6, the following headlines were pu
lished:

"Roy Gustafson Explains Why He'll Ask Death Penal
for Duncan Murder Trio"

[fol. 14] In the article following the headline, Roy
Gustafson, apparently being interviewed by report
Marvin Sosna, stated that "the chances of rehabilitati
the three persons arraigned today on a charge of murd
for hire are awfully slim . . . and I don't want to ta
that kind of chance." The article goes on as follow
"But he (Gustafson) believes that the Duncan case a
torture-sex slayings attributed to confessed killer Harv
Glatman in San Diego County will deter a number

legislators from voting for abolition (of the death penalty) during the coming legislative session." In discussing rehabilitation further, the article states: "But as far as rehabilitation goes, Moya was paroled a year ago after serving a year out of a 1-to-10 year term for marijuana possession. Gustafson says Moya was using marijuana when he was arrested in the Duncan murder case." The article further states: "He (Gustafson) commented that the possibility of putting California's third woman in the gas chamber does not present him (Gustafson) with any qualms. 'This is appropriate punishment', he said, paraphrasing the judge in the Harvey Glatman case. And he adds: 'What are you going to do, rehabilitate 'em.'"

In the December 29, 1959 issue of the Ventura County Star Free Press, copy of which is attached hereto as Exhibit 9, the following headline appears on Page 1: "Heart Attack Sends Mrs. Duncan to Hospital". In the article following the headline, the following appears: "District Attorney Roy A. Gustafson this morning said that Mrs. Duncan's illness may have been real but added that: 'This is a trick used by many persons in jail on a serious charge. It is known that suspects fake illnesses to get into a hospital where there is a chance for escape.'"

Other public officers saw fit to express their opinions on the case. In the December 22, 1958 issue of the Los Angeles Herald Express, a copy of which is attached hereto as Exhibit 10, referring to the above entitled case the following was reported on Page 1: "The execution of [fol. 15] the $6000 slaying was called by Santa Barbara Police Lieut. Charles Thompson, 'the most cold-blooded crime I've ever heard of. We knew from the first there was something strange about this case.'"

In the December 15, 1958 issue of the Ventura County Star Free Press, a copy of which is attached hereto as Exhibit 11, referring to the disappearance of Olga Duncan and arrest of Elizabeth Duncan, on Page 1, the following appeared: "But there were indications of more serious charges. Said Woodruff J. Deam, chief criminal deputy of the district attorney's office: 'When we have a suspected murder case, we don't give hints.'"

Apparently the attitude expressed by Mr. Deem was not shared by his fellow law enforcement officials connected

with the investigation. Not only were "hints" given ou thereafter, but moreso, a play by play description of ever detailed phase of the investigation. The matters reporte by the newspapers were of a nature which must necessaril have come from law enforcement officers. Throughout th reports published were various law enforcement officer statements concerning every new development in the cas The information revealed was so complete and detaile that affiant believes for all practical purposes, the cas has been tried. The names of the officers giving out infor mation and the information published are set forth in fu in the following copies of the following issues of the Ven tura County Star-Free Press, which are attached heret and numbered accordingly:

December 16, 1958—Exhibit 11-A
December 17, 1958—Exhibit 12
December 18, 1958—Exhibit 13
December 19, 1958—Exhibit 14
December 20, 1958—Exhibit 15
December 23, 1958—Exhibit 16
December 24, 1958—Exhibit 17
[fol. 16] December 26, 1958—Exhibit 18
December 31, 1958—Exhibit 19

The Ventura County Star Free Press has the larges circulation (22,000) of any other newspaper published i Ventura County. It and the Oxnard Press Courier are th only two daily newspapers published in the County o Ventura. The Oxnard Press Courier is a newspaper o general circulation and advertises itself as the official new paper of the City of Oxnard. The City of Oxnard is th largest city in the County of Ventura with a population o approximately 35,000. Practically the same facts concer ing the investigation of the above entitled case were pub lished in the Oxnard Press Courier. The following issue of the Oxnard Press Courier are attached hereto as th following numbered exhibits:

December 16, 1958—Exhibit 20
December 17, 1958—Exhibit 21
December 19 1958—Exhibit 22
December 20, 1958—Exhibit 23

December 22, 1958—Exhibit 24
December 23, 1958—Exhibit 25
December 26, 1958—Exhibit 26
December 29, 1958—Exhibit 27
December 31, 1958—Exhibit 28

In subsequent issues of both the Ventura County Star Free Press and the Oxnard Press Courier, there were published practically the whole of the recorded transcript of the testimony taken before the Grand Jury which returned the indictment in the above entitled case. The recorded transcript appeared as daily installments with verbatim passages of Grand Jury testimony published. A typical example are the passages published in the December 31, 1958 issue of the Oxnard Press Courier attached hereto as Exhibit 28.

Affiant is informed and believes and thereon alleges that the Los Angeles Times is the newspaper of largest circula-
[fol. 17] tion in Southern California. It is published in the County of Los Angeles but is widely circulated and read in the County of Ventura. Attached hereto as Exhibits are the copies of the following issues:

December 16, 1958—Exhibit 29
December 22, 1958—Exhibit 30
December 23, 1958—Exhibit 31
December 31, 1958—Exhibit 32

The Los Angeles News Herald is a newspaper of general circulation and is published in the County of Los Angeles but which is widely circulated and read in the County of Ventura. Attached hereto as Exhibits are the following copies of issues:

December 15, 1958—Exhibit 33
December 26, 1958—Exhibit 34
December 30, 1958—Exhibit 35

The above exhibits are to illustrate the widespread notoriety given the above entitled case, the type of information released to newspapers by law enforcement officers, the release of the Grand Jury transcript for publication, the information published which would not even constitute

evidence in the case, and the prejudice which must necessarily have resulted from such publications.

The above entitled case has also been discussed and commented upon by practically every radio and television newscaster in the Los Angeles-Ventura County area. The broadcasts which affiant has heard was in substance the same as that reported in the newspapers attached hereto as exhibits.

Defendant Luis Moya is of Spanish-Mexican descent. During affiant's residence in the County of Ventura for the past four years, he has heard various comments from time to time from residents of Ventura County indicating prejudice toward certain persons of Spanish-Mexican descent.

[fol. 18] Burt M. Henson.

Subscribed and sworn to before me this 10th day of January, 1959.

——, ——, Notary Public in and for the County of Ventura, State of California.

[fol. 19] DEFENDANT'S REQUESTED CHARGE

Ladies and Gentlemen of the Jury:

Augustine Baldonado, the defendant in this case, has pleaded guilty to the crime of first degree murder. For the purposes of this trial, you as jurors must accept the fact that the defendant did commit first degree murder.

The law of this State provides that every person guilty of murder in the first degree shall suffer death or confinement in the State Prison for life. It is now your duty to determine which of these two penalties shall be inflicted. Appropriate verdict forms will be handed to you for that purpose.

In fixing the penalty, you are entirely free to act according to your own judgment. Your discretion in the selection of penalty is in no way circumscribed or limited by law. It is an absolute discretion. For example, there is no rule of law which calls for a sentence of death simply because you find that there are no mitigating or extenuating circumstances. Similarly, there is no rule of law which

calls for a sentence of life imprisonment simply because you find that there are no aggravating circumstances. Nevertheless, your choice of penalty must be a meaningful one—a choice fundamentally based on the evidence in this case.

In making a meaningful choice, you may give weight to any consideration whatever which, in the light of the evidence, seems important to you. Without attempting to name all possible considerations to which you may give weight, I list some examples:

1. Defendant's age, physical condition, mentality and character.
2. The presence or absence of any provocation for the murder.
3. Your sympathy for, or indignation toward, the defendant.
4. The objectives of punishment.
5. The consequences of the two possible penalties. In connection with this factor, the law provides that the [fol. 20] Governor may pardon the defendant at any time or reduce his sentence whether that sentence is death or life imprisonment. If the sentence is life imprisonment, however, the defendant may also be paroled, but not until he has served at least seven years.

The law conclusively presumes that the defendant was legally sane at the time he committed the murder and is therefore legally responsible and punishable for his crime.

Upon retiring to the jury room, you will select one of your number to act as foreman, who will preside over your deliberations and who will sign the verdict to which you agree. In order to return a verdict, it is necessary that all twelve of the jurors agree to the decision. As soon as all of you have agreed upon a verdict, you shall have it signed and dated by your foreman and then return with it to this room.

Given.

Chas. F. Blackstock, Judge.

Constitution, article VII, section 1 (Pardon and Commutation. Penal Code, section 3046 (Parole).

People v. *Byrd* (1954), 42 Cal. 2d 200.
People v. *Green* (1956), 47 Cal. 2d 209.
People v. *Riser* (1956), 47 Cal. 2d 566.
People v. *Friend* (1957), 47 Cal. 2d 749.
People v. *Brust* (1957), 47 Cal. 2d 776.

[fols. a-29] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

Honorable Charles F. Blackstock, Judge.

No. CR-3220

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

AUGUSTINE BALDONADO, Defendant

Reporter's Transcript of Proceedings

[fol. 30] IN THE SUPERIOR COURT OF VENTURA COUNTY, APPLICATION FOR REMOVAL OF ACTION

Mr. Henson: On behalf of defendant Moya I hereby make application for removal of the action under the provisions of Section 1033 of the Penal Code. This motion is made in writing. The notice of this was served upon the Assistant District Attorney yesterday at 9:05 and is supported by affidavits of the defendant and other persons. I have filed it here with the Court and also as part of the affidavit which should have been attached to the affidavit, but which was practically impossible, are certain copies of newspapers here which I have referred to as exhibits, and they should be regarded as attached to the affidavit and a part thereof, [fol. 31] and I ask that these also be filed with the Clerk to accompany the affidavits.

Mr. Gustafson: I have prepared counter-affidavits, copies of which I have served on all counsel, counsel for Elizabeth Duncan, for Mr. Baldonado and for Mr. Moya, and I now file the counter-affidavits.

Mr. Danch: On behalf of defendant Baldonado I have filed, your Honor, an application for removal of the action based on the affidavit of the defendant and also referred to the affidavit filed by Mr. Henson.

Mr. Gustafson: And Mr. Sullivan.

Mr. Danch: And Mr. Sullivan, yes.

ARGUMENT OF MR. HENSON

Mr. Henson: I am prepared to argue this motion at this time, your Honor, if you care to hear argument.

First of all, I think we have to start with the proposition that this is not just a case where, like the defendants in your regular criminal calendar which was just disposed of, they may spend a year in the County Jail or maybe a year or so in prison. This is a case where the prospects that the defendants look forward to may be the dropping of the pellets and the directions to count to 10 and take a deep breath, so that this case I think ought to be considered in that light.

I think that the case ought to be considered in the light of the case of the People versus McKay, 37 Cal. 2nd, 792, where the basic legal proposition was spelled out and [fol. 32] the court states this: regardless of their guilt, however, they were entitled to a fair and impartial trial, and that case cites the case of Moore versus Dempsey, 261 U.S. 86, and a concurring opinion of Justice Jackson in Shepherd versus Florida, 341 U.S. 50. So that we have to start with that proposition, that regardless of the guilt, it is not a question of guilt or innocence at this point, it is a question of whether this defendant or any of these defendants can be afforded a fair and impartial trial, and it doesn't only apply to these defendants, but it is something that goes a lot deeper than just the merits of this case.

First of all, I think a fair and impartial trial means something approaching objectivity. Now, if you will look at the affidavits which have been filed by myself in this case, you will see that there were several very substantial citizens of this community and of this County, first of all, Rev. Gilbert of the St. Paul's Episcopal Church in Ventura, and a Rev. Floyd K. Gressett of the Avenue Community Church in the City of Ventura. These are ministers of the gospel who have had some connection with criminal law, Rev. Gilbert having at one time served as a chaplain to the Washington State Prison, and Rev. Gressett at this time serving as chaplain to defendant Moya. This fact is known by their friends and acquaintances, and so, naturally, this case is going to be discussed with them. Their affidavits state clearly that those persons with whom they have dis- [fol. 33] cussed the case have either expressed a deep-

seated prejudice against these defendants, professed a knowledge of all of the facts of the case, either that or they expressed the opinion that it would be impossible to have a fair and impartial trial in this County because of the prejudice.

Along with the two persons whom I have just referred to we have affidavits by three attorneys in this County, in this community. Donald L. Benton, an attorney of some years of practice, states that people, when he has discussed this case with them, pointed out that their opinions and prejudice were based on newspaper releases issued by law enforcement agencies, said that they stated in return "They better not let me on the jury. I would hang them."

We have affidavits by attorneys David Drapeau and Albert T. Blanford of this community who stated in substance that practically everyone they have talked to has expressed an opinion, either an opinion that they were prejudiced or that the defendants could not obtain a fair and impartial trial.

Besides that we have an affidavit from a David E. Flynn who was formerly Judge of the Justice Court of the Moorpark-Camarillo Judicial District who spoke to a man who said in substance that "Everyone connected with this case should be summarily exterminated," and even went so far as to say that he had intended to consult with one of the defense counsel as a private attorney, but since that defense counsel was connected with this case, he wasn't going to see [fol. 34] him as an attorney, and stated that from what Mr. Flynn stated was the lynch law, then the lynch law should be applied in this case, stated that it would hurt particular defense counsel in law practice if he continued to serve as defense counsel. This man stated to David Flynn that he had talked to 12 other persons in the Oxnard-Camarillo area and they felt the same way.

This, I hope your Honor realizes, is just typical. We couldn't in the time allotted, like Mr. Danch has just stated here, spend 24 hours a day running around getting people to sign affidavits. Now, we are not like the District Attorney with a staff of eight or nine lawyers and four investigators to work for him. We have to do all this ourselves, besides trying to carry on a private law practice and, as Mr. Danch has stated, and I will state that we are not wealthy at-

torneys who can afford to lose time from our private practice.

Now, I didn't think too much about prejudice in this case myself until I appeared in this court last week and heard the group prejudice that I heard in this courtroom, and I didn't think it was so bad until I went home and told my family that I had been appointed on this case and my 11-year old daughter told me that it was a bum case and "What did you do that for?" And when it goes that far, I say that something is wrong.

Now, I hope your Honor will read and consider those newspapers which we have attached to the affidavits. [fol. 35] Primarily, they are newspapers from the Oxnard Press-Courier and the Ventura Star-Free Press, which are the only two daily newspapers that I know of in the County of Ventura. The Oxnard Press-Courier professes to be the official newspaper of the City of Oxnard and, of course, the Ventura Star-Free Press is more or less considered the official newspaper in the City of Ventura and the County of Ventura.

Before I was on this case, we talked to many people about it and everybody I talked to, except one man, referred to these defendants in terms such as "Dirty bastard, lousy son of a bitches," and things like that, had their minds made up, either that or they expressed the sentiment that public officials had made such statements about this case that there couldn't possibly be a fair trial. As I say, only one man said that he would try to reserve judgment, but he added that, "I hope I am not called upon to serve as a juror."

Now, the worst part of the prejudice that exists against these defendants I believe is the fact that the District Attorney and the law enforcement officers connected with the investigation of this case have been the primary cause of the prejudice. As a typical example—I am not going to take the Court's time up with a recital of everything. I hope your Honor will read each and every one of these newspapers and see if you try to put yourself in the place of an ordinary lay citizen man on the street with no knowledge of the law or the legal processes, read all these [fol. 36] newspapers and then ask yourself whether you could serve as a fair and impartial juror on this case.

I am just going to cite two or three examples here, and the most flagrant example that I can see appeared on the front page of the December 22nd edition of the Ventura Star-Free Press when the headline says "DA Urges Death Term in Killings." This was dated December 22nd. This case never even went to the Grand Jury before December 26th. It states here: "District Attorney Roy Gustafson today saw the Duncan murder as reason for continuation of California's death penalty. He issued the following statement: "And I say this is a statement of a personal opinion which has some ethical connections with it as well as certainly creating prejudice against these defendants in this case, as well as being this: if this same statement were made before your Honor in the trial of this matter, I believe your Honor might consider it very seriously as being inflammatory and perhaps prejudicial misconduct on the part of the District Attorney but, mind you, this was made before any legal body had taken any legal action on this case. That is as follows:

"The brutal, calculated, revolting killing for hire of Olga Duncan is one of a number of horrible crimes which have recently been committed in California. I simply cannot understand how some of our leaders in the face of these events can seriously contend that the death penalty is not appropriate punishment for the perpetrators of such a [fol. 37] crime. Many persons contend that the death penalty does not deter murder. Frankly, I am sick of this illogical argument. Of course, penalties do not completely deter crimes. Jail sentences do not completely deter drunken drivers, burglars, robbers, or any other criminals and death penalties do not completely deter murders, but there is no reason to dispense with penalties. Retaliation is a basic instinct of the human race. In civilized societies the government takes over from the individual the job of retaliating against a wrongdoer. From Biblical times a life for a life has been recognized as just and fair. The alternative in California, a life sentence which permits a prisoner to be paroled in seven years simply is insufficient retaliation. I hope the people of this State rise up against the propaganda drive that has flooded us lately about the so-called evils of capital punishment. They must demand that California retain the death penalty to deal with situations such as the Duncan case."

So before the case has ever been presented to the Grand Jury, before any complaints have been filed or anything else, the District Attorney is whooping it up and trying to make it a political issue and trying to use it, whatever it is, his idea of what the outcome of the case should be as an example of why the Legislature should retain the death penalty.

This same statement appeared in the Oxnard Press-Courier, and further along the way when there was one situation here in the December 27th edition—excuse me—[fol. 38] particularly in the December 30th issue, edition of the Star Free-Press on Page 6 there is a big headline "Testimony in Duncan murder revealed," and in passing there is a question in my mind of how and why the whole transcript of the Grand Jury testimony was released to the newspapers and there is a question in my mind of how come the newspapers proceeded thereafter to have daily installments of this nine hours of Grand Jury testimony appear almost as other installments of a murder story or something like that.

But the worst of all on Page 7 here is the sub-headline "Roy Gustafson explains why penalty for the Duncan murder trio." This is, of course, after the Grand Jury has acted, but before the court has acted, and he gives a lengthy dissertation of his views about the death penalty, about rehabilitation, and says that rehabilitation, as far as defendant Moya was concerned, Moya was paroled a year ago after serving a year out of a one to 10-year term for marijuana possession. Gustafson says, "Moya was using marijuana when he was arrested in the Duncan murder case." And he, Gustafson, comments that the possibility of putting California's third woman in the gas chamber does not present him with any qualms. "This is appropriate punishment," he says, paraphrasing the Judge in the Harvey Glatman case, he adds, "what are you going to do to them, rehabilitate them?"

Now there are many others here. Like I say, I hope your Honor will read them and put yourself in the place of a prospective juror.

[fol. 39] Now it isn't enough that the District Attorney argues his case before it is ever presented to the Court, but it seems that all the evidence in the case has been presented to the public by way of the newspapers. Now, this

was done through various officers who were involved in the investigation of this case. If you will read through these newspapers, you will find here, there, every day, just about, various officers were quoted, or the things was that Officer So-and-So said this, Officer So-and-So said that. As a typical example of this in the Monday, December 22nd edition of the Oxnard Press-Courier on Page 1, and the headlines, "Confessed Slayer Leads Deputies to Missing Nurse's Shallow Grave. Says Mother-in-Law Bought the Murder."

Going down in the column, I quote, "This is the story related to the Press-Courier by Deputy Higgins. He and Clarence Henderson, Chief Investigator for the District Attorney's Office, questioned Baldonado late yesterday morning. At noon he confessed the murder. Baldonado says he and his accomplice Moya drove to the Santa Barbara home of the pretty 30-year old nurse late in the evening." I am not going to read it, but it is all here. Here is before the Grand Jury or anybody else has ever acted upon the case, a Deputy Sheriff relating the whole substance of a confession, and I say that is just a typical example.

Another example is in—in other words, after the headlines, after the officers got through talking and telling all [fol. 40] about the evidence and after the District Attorney got through arguing his case, then the newspapers, apparently to keep public opinion alive, started printing verbatim passages from the Grand Jury transcript. An example of this is in the December 31 edition of the Oxnard Press-Courier where after an article stating that killer's wife had twin sons after the murder, down at the bottom it says in parentheses "Press-Courier today continues printing testimony that led to a Grand Jury indictment of Elizabeth Duncan, Baldonado and Moya. Most of Moya's testimony is on Page 9 today."

I know your Honor has tried cases and been a Judge and been connected with the law for many, many years. I don't mind trying a case, no matter what the evidence is, even though my own daughter thinks it is a bum case, as long as the case hasn't been tried already, and I say that this case has been tried already. It has been tried by the officers telling every phase about the investigation. It has been tried by the District Attorney with his state-

ments of personal opinion, with his dissertations on the death penalty and the theory behind it. It has been tried by printing practically every important part of the Grand Jury transcript verbatim. And I believe that any juror who is called upon to hear this case is going to feel just like he is sitting through a movie a second time. I say that is not a trial. That is not what the court processes are for. If we are going to have a trial with people like that sitting on the jury, there is no sense in having a trial. We [fol. 41] might as well just go ahead and sentence these people now because there is no point in going through the process and taking up the Court's time and spending the County money, going through the motions.

So I ask your Honor to give some real serious thought to this case, putting yourself in a number of positions, first of all, as a prospective juror after you read these newspaper articles. Like I say, newspapers weren't the only thing. There was television, radio, practically every means of communication. Put yourself then in a juror's position. Then put yourself in the District Attorney's position. Would you want to try a case, would it be any smashing victory to you to try a case before a stacked jury?

Put yourself in the defense counsel's standpoint. Would you feel like you were doing anything? Would you feel like you were getting any kind of a fair shake if you were going to try a case before a jury composed of people that knew all about the case, that heard the case argued, and so forth, and then ask yourself in your own position here where you as a judge, if it ever came to the point where if you had to sign the papers that sent these people where they might go, are you going to feel right about it? That's all.

ARGUMENT OF MR. DANCH

Mr. Danch: Your Honor, I think that Mr. Henson certainly has covered the extent and nature of the publicity that was given to this matter.

I have examined Mr. Gustafson's counter-affidavits and [fol. 42] it appears to me that he dwells heavily on the fact that his conduct was legal, that it was legal for him to give out information and that it was legal for him to give his opinion. Well, certainly it was legal, but I don't

think that is the question here. This is not the proper place to decide the legality or propriety of his conduct. The only question is whether or not the conduct did occur and what effect it had on the people.

The District Attorney, as a public servant, is listened to by the people. His words carry more weight than the ordinary layman, even more weight than defense attorneys, and that is why the law holds him to a higher standard of conduct than of other lawyers. When he is in trial, he is obliged to hold or regard the rights of the defendant, not only prosecute him.

I think in this instance this case has aroused more publicity than any case certainly since I have been in Ventura County. I think the statements of the District Attorney have been more inflammatory than any I have ever seen since I have been in this County or anywhere in the State.

I think as a result of the intense publicity, combined with this statement, whether or not he has a right to make them, that there now exists a situation that makes it impossible to have a fair trial in this County.

Mr. Gustafson says he has as much right as Rev. Gilbert to express his opinion. That is true, but his opinion carries [fol. 43] more weight with the public.

The Grand Jury transcript does, in fact, carry all the testimony and the newspaper men do have access to that. So if he says whether or not he released the evidence, it would appear in the transcript, that again to me is immaterial. The fact is that because of the nature of the case, publicity has been focused upon it and that evidence is given much greater publicity than it would have ordinarily. Generally speaking, people aren't bothered with a Grand Jury transcript and do not read them. In this case I think most of the people are familiar with most of the transcript. In the event that the case goes to trial and some of the evidence that was presented at the Grand Jury hearing was excluded, it would be of no practical value to the defendants because, in fact, all of the jurors would know that that evidence had been admitted in the Grand Jury hearing, so that jurors do not, as a rule, have the ability to wipe their minds clean of evidence which was not admitted.

I think that it would be almost, in fact, impossible to have an impartial jury, a jury that would not have most of the evidence in mind whether it was legally admissible or not.

ARGUMENT OF MR. GUSTAFSON

Mr. Gustafson: Your Honor, I would like to take up these items in a chronological order, if I can, in answer to Mr. Danch's argument and in answer to Mr. Henson's argument.

The basic section is Section 1033 of the Penal Code. [fol. 44] The only ground for removal is that a fair and impartial trial cannot be had in the County. The cases are clear that that refers to the inability to get a fair and impartial jury of 12 persons in the County. All of the matters which have been submitted by affidavit and allegations by Mr. Danch and Mr. Henson must necessarily be considered in the light of do those affidavits prove that we cannot get 12 persons in this County who will act fairly and impartially?

Mr. Henson and Mr. Danch first say that we can't because the facts of the crime have been released to the newspapers, to the radio, to television, and hereafter I will use the term "newspapers" to cover all media of communication, and have been printed therein.

Well, this is not unusual. It may be unusual in this case because of the unique nature of the facts of this case. It may be unusual in the sense that more was printed but every day in the newspapers throughout this whole United States facts are printed about the fact that a crime occurred in as many details as newspaper reporters are able to get showing the exact fact that did occur. It seems to me that it will be a sorry day for this country when any rule or law is enacted which prohibits the newspapers from reporting events that have happened.

Nor does any rule of law prohibit any public official whether it be I or an investigator or a Deputy Sheriff or a chief of police in Santa Barbara or an FBI agent or the [fol. 45] District Attorney of Santa Barbara or any other person, from giving information and facts to the newspaper. As a matter of fact, I think it is a matter of common knowledge that this very often helps to solve crimes. The very solving of a kidnapping of a baby in New York

the other day or yesterday was solved principally because of the wide-spread publicity given to the description of the woman who took the baby and a broadcast for getting an anonymous call to the police station that the police would check out, and they checked out one anonymous call and found the baby and found the person who had the baby. I don't see that there is anything wrong, and Mr. Danch admits there is nothing legally wrong, with newspapers publishing information nor with officials giving information to the newspaper.

Now, with respect to the cases on what has happened when facts are printed in the newspapers, the only cases, your Honor, in which it has ever in the whole United States been held that the newspaper publications of the account of a crime have prejudiced the defendant and kept the defendant from having a fair trial is when the facts, the purported facts stated in the newspaper are not facts; namely distortions and untruths and lies and of made-up stories. This is the harm, not that facts are published, but that misfacts are published. And in this particular case there isn't one affidavit presented by Mr. Henson or Mr. Sullivan, whose affidavit was incorporated by Mr. [fol. 46] Danch's, or Mr. Danch which says that one fact stated in any of the newspaper reports is untrue. Now, the only petulant denial of the truth of anything reported in the newspaper comes not from the defendant, but from me. In my affidavits before your Honor I point out that there are some, there was at least one misstatement and that was with respect to a statement quoted by Mr. Henson in his affidavit, and again to the Court orally, that I said that Moya was using marijuana at the time of his arrest. My affidavit denies that I ever stated that to the newspaper or to anyone. My affidavit shows that the newspaper the next day published a statement stating that this was in error and that I had not stated any such thing, but Mr. Henson conveniently neglects to mention that that was corrected by the newspaper itself. He only talked about the first statement, the misstatement that was made.

Now, it is true, your Honor, that there are some facts and they are true and correct facts which are published by newspapers at times which would be inadmissible in court in evidence. In this particular case I think reference has

been made to the fact that Mr. Moya is an ex-convict. In the exhibits attached to Mr. Henson's affidavit it shows that statements have been made that Mr. Baldonado has been convicted, for example, of failing to provide for his children and Mrs. Duncan was convicted of a morals offense in San Francisco, and these things will not be admissible in evidence in the case-in-chief by the prosecutor, but, again, [fol. 47] the fact that any court of law by reason of some rule the jury is not permitted to hear the truth does not require that a newspaper or other media of communication keep their readers from hearing the truth.

Now, with respect to the transcript, I point out in my affidavit, and I assert here again, your Honor, that there was nothing that was published prior to the return of the indictment by the Grand Jury and the official filing of the Grand Jury transcript, which then became a public record, nothing relating to the facts which was published prior to that time which equalled in detail the facts as related in the Grand Jury transcript. So that regardless of whether the people of this community and other communities in California had known anything about this case or even heard of it prior to the filing of the Grand Jury transcript, they would have heard all about it at that time and in more detail than they ever heard prior to that time and with more accuracy because all of the testimony was under oath and not the result of newspaper interviews.

Moreover, the fact is that when any indictment is filed in court with the names of the witnesses appended to it, as is required by law, there is nothing to preclude a witness from telling a newspaper reporter what he testified to before the Grand Jury. And the papers that Mr. Henson has attached as exhibits will show to your Honor that already the enterprising newspaper reporters had begun to interview persons who were witnesses before the Grand Jury and were then publishing what those persons said [fol. 48] to the Grand Jury. It seems to me that it is much better that the information come directly from quotes of what the Court Reporter says they said at the Grand Jury than what they recall having said at the Grand Jury, because truth is what I believe the newspapers are interested in and what the public wants to read and I can see no harm in the truth.

I emphasize again that there is not one single word in any affidavit by Mr. Henson or Mr. Danch saying that the journalists have misstated the truth. There is from me, but not from them.

Now, that is with respect to the facts constituting this particular case. There was another statement alluded to, very much alluded to by Mr. Henson in his affidavit, by Mr. Sullivan, by Mr. Danch by incorporating it in his affidavit, and that was my statement with respect to my views on the principle of capital punishment. The statement quoted in the affidavits of defendants is inaccurate, and I have set forth in my affidavit the exact statement that was made and the exact statement that was published as having come from me in the Ventura County Star-Free Press. Mr. Sullivan's affidavit omits several very important words in that respect. I think I have a perfect right and now I am glad to hear Mr. Danch acknowledge that I have just as much right to express my view with respect to legislation as Rev. Gilbert or any other person. It just so happens that our views differ on this as to [fol. 49] whether capital punishment should be abolished in California.

I certainly respectfully disagree with Mr. Henson when he states that this is a statement of my opinion regarding the defendants in this case. I urge the Court to read that statement and to try to find any reference to the defendants collectively or individually in this particular case. I refer to the perpetrators of such a crime as the murder of Olga Duncan and, of course, that necessarily means that it must first be established that Olga Duncan was murdered, secondly, who the perpetrators were. Now, there was no reference to these defendants by name or otherwise as individual persons and no reference in there or any other time of mine to my personal belief and knowledge of the guilt of the defendants. Never has there been any such statement.

Now, Mr. Sullivan incorporates in his affidavit another statement purportedly made by me with respect particularly to the defendants and their guilt and what should happen to them. Mr. Henson on the information and belief and, obviously, because he read Mr. Sullivan's affidavit, repeats this statement, and he says it was pub-

lished in the Ventura Star-Free Press of a particular issue. I have filed an affidavit in which I deny ever making any statement of that nature or anything substantially like it. I have an affidavit from the managing editor of the Star-Free Press stating that no such statement was ever published in that newspaper, despite what Mr. Sulli- [fol. 50] van's affidavit says, and I represent to the Court that I have no knowledge of any such statement having ever been published in any newspaper in the United States. I haven't the slightest idea where it came from and I say in my affidavit categorically it is absolutely false and untrue in all respects. I never said any such thing.

Now, insofar as the statement that I made and the only statement that I issued in writing with respect to my views on the retention of capital punishment in general in California to deal not with the Duncan case, but to deal with situations such as the Duncan case, cannot possibly, as a matter of fact, be prejudicial to the defendants. In the first place, of course, it referred to the perpetrators of the crime. The trial in this court set for February 16th will now determine whether all or any of these defendants were the perpetrators of that crime. If they are not guilty, they weren't the perpetrators of that crime and it couldn't possibly apply to them. If they are guilty, they were the perpetrators of the crime and then it would apply to them, but even so, it would not be prejudicial because all it would be doing would be disclosing that if somebody is guilty of a first degree murder of Olga Duncan, I believe that somebody deserves the death penalty. Disclosing that in advance can't do any harm to defendants.

When this courtroom is full of jurors next February 16th and these prospective jurors get in the box, the very [fol. 51] first thing that they are going to know is that the prosecutor seeks the death penalty because the very first questions that will be asked of them before any jury is sworn in is whether they have any conscientious objections against the death penalty. Your Honor well knows in every murder trial where the prosecutor seeks the death penalty everyone knows it before the jury is actually sworn, and I can't imagine what difference it makes whether they know it three days before the jury is sworn or four days, as the case will likely be when this trial starts, or whether they

know it six weeks or eight weeks before the jury is sworn.

I also want to mention this, your Honor, with respect to the statement on capital punishment: I have an affidavit from Mr. McHenry, the managing editor of the Star-Free Press, that should actually make the defendants very happy in this respect. The only response that the Star-Free Press received to my statement with respect to capital punishment were letters against my stand, three of which were published. They received not one single letter from anybody in Ventura County concurring with the fact, concurring with the belief that capital punishment should be retained in California. Moreover, another thing not mentioned by Mr. Henson orally or in his affidavit, was that he made a great statement, much longer than mine, which was published in full in the Ventura County Star-Free Press, attacking me, stating his views about rehabilitation, about society being the cause of a lot of ills, and so forth. All [fol. 52] of that as against the one statement that I made with respect to a legislative matter.

Now, the most essential thing, apparently, that all of these affidavits of the defendants goes to do is to state that people have made up their minds in Ventura County as to the guilt of these defendants. Well, in the first place, your Honor, there is not one single affidavit before you from one single resident of Ventura County stating that he, that resident, has made up his mind about the guilt of the defendants. All of the affidavits are from persons who stated that other persons have told them, told the declarant in the affidavit that other persons have made up their minds. I think that that, in the first place, is legally insufficient. There isn't a single affidavit from a single person stating that he has made up his mind.

Secondly, and most important, and I urge your Honor to read the case with respect to this, as I am sure you will, and to read the law of the State of California and the Penal Code section, the fact that newspapers publish reports about the facts of a crime and the fact that people, prospective jurors read the reports and the fact that they will, on the basis of those reports, form an opinion of the guilt of the defendants and have and retain that opinion and have expressed that opinion when they come to sit as jurors is an acknowledged fact in California and one recognized by our

law. And so our law provides in Section 1076 of the Penal [fol. 53] Code that no person shall be disqualified as a juror by reason of having or expressed an opinion upon the matter or cause to be submitted to such jury founded upon public rumor or statement in public journals, circulars or other literature or common notoriety. The fact that people in Ventura County have formed opinions of the guilt of these defendants and if they come to this jury box and have those opinions and have previously expressed them is no disqualification for them to sit on the jury, provided, providing it appears to the Court upon his declaration; that is, the declaration of the prospective juror, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him.

Now again, your Honor, there is not a single affidavit before your Honor from these defendants stating that any of these persons, unnamed, not a name given, who supposedly said their minds were made up the defendants are guilty, there is not one word of evidence saying that these persons would not, despite those opinions, act fairly and impartially upon the evidence if they were called upon to serve as jurors, despite the fact that they have an opinion of the guilt of the defendant. It is rather difficult, not rather difficult, it is impossible for me to get any affidavits from any of those persons who have such opinions of the guilt of the defendants stating from those persons that they would, nevertheless, act fairly and impartially, because for whatever reason, all of these affidavits submit- [fol. 54] ted by Mr. Henson do not name one single person by name so that I can find out who these allegedly opinionated persons are.

Again I repeat that the crux of the matter is whether we can get a fair and impartial jury and despite opinions we can get a fair and impartial jury under the law if these persons will say that they abide by the evidence in court and not be governed by the opinion that they have heretofore reached or expressed from facts they read in the newspapers.

Mr. Henson did not argue, but he mentions in his affidavit the fact that there must be a lot of prejudice because the Grand Jury returned an indictment in 15 minutes.

There is no merit to that argument because 15 minutes is not an unusual time for the Grand Jury to deliberate and return an indictment. I personally cannot recallect, and I said so in the affidavit, any cases before the Grand Jury in my eight years as District Attorney where the Grand Jury took any longer than 15 minutes to deliberate before returning an indictment.

Moreover, in the case of the People versus Daugherty, which I cite in my affidavit, here was a long trial with a transcript five times longer than the transcript in this Grand Jury testimony, a trial before a trial jury involving, first of all, the issue of guilt of the defendants and, if so, what degree of homicide they were guilty of, and then if guilty of first degree, what the penalty should be, and that jury deliberated one hour and 15 minutes after a lengthy [fol. 55] trial and returned a verdict of first degree murder with the death peralty and the Supreme Court brushed aside the arguments that that showed that the jury was prejudiced and didn't give consideration to the facts. I quote extensively from that case to show that there is absolutely no merit in this statement, particularly since, as the Supreme Court said in People versus Daugherty, the evidence was pretty clear, although it was all curcumstantial in that case, there wasn't much question about the killing that occurred in this place.

I wonder what the people would think of the members of the Grand Jury of Ventura County if they had a great deal of difficulty after listening to Mr. Moya and Mr. Baldonado testify completely with respect to what they had done to Olga Duncan, if the Grand Jury had to debate an hour or two to decide whether Olga Duncan was killed and, if so, by whom.

Mr. Henson also mentions in his affidavit, and he did not say this in court, but he mentions it in his affidavit that he believes that the people of Ventura County are prejudiced against persons of Mexican origin. This is the first time that any issue of what has been raised by anybody, and it is injected in here by way of an affidavit by Mr. Henson. In my counter-affidavits I think I have set forth that in my experience as District Attorney there has been no such prejudice exhibited by any Judge in Ventura County or any jurors in Ventura County, nor have I heard from people with respect to criminal cases.

[fol. 56] If anything, there is certainly an attitude on the part of the people of Ventura County to be very broad-minded, fair and impartial with respect to persons of Mexican origin who might be defendants in criminal cases. Certainly your Honor knows it is true and I know it is true, and I have set forth in the affidavit, that in the entire time in Ventura County I know of no single case where any court, trial or appellate or otherwise, has ever said that any person of Mexican origin did not get a fair trial from a jury or a judge because he was of Mexican origin. I think that reason is as fallacious as the others set forth.

Then Mr. Henson makes a big point of the fact that this courtroom was crowded at the arraignment a week ago today. And, as a matter of fact, the fact that he doesn't think much, he doesn't really believe that these newspaper accounts have prejudiced his client or made it impossible to get a fair and impartial jury in Ventura County is illustrated by the fact that he said that until he walked in the courtroom here last Tuesday he wasn't thinking about prejudice or change of trial or anything, but it was the courtroom crowd that gave him this idea. Now, all these newspaper accounts were published before last Tuesday. They didn't phase Mr. Henson then. Now it is an afterthought, but he says when he walked in here he saw this crowd and this is what convinced him that they couldn't get a fair trial.

Well, I will say this, that I have an affidavit from the [fol. 57] Undersheriff denying that there was any such number as 1,000 persons in or out of this courtroom or in and out together. I think it is quite fair to state that your Honor can observe and know how many people are in the courtroom. There are 99 seats in this courtroom. Sure, there were people standing, but there weren't as many people standing as there were sitting and outside the door there was a small group of people. The Undersheriff has filed an affidavit here that in his opinion there were less than 200 people both in and out of the courtroom. And I would be happy if Mr. Henson wants to put on the reporter from the Los Angeles Examiner and put him under oath, who was the representative of the Examiner, which was the paper that published that there

were a thousand persons in this courtroom, and ask him how many there really were in the courtroom and outside of the courtroom. I can't help it if the Los Angeles newspaper says there were a thousand people here when, in fact, there weren't. The defendants know there weren't, counsel know there weren't and you, your Honor, knows that there weren't.

Furthermore, the fact that there would be a lot of people here would not be unusual considering that there are 170,000 people, at least, in this County and that the facts of this case are rather unique and that people are naturally curious. They wanted to look, apparently, at the defendants.

Today, one week later, look at the people in the audience. The 99 seats aren't half taken by persons, one week from [fol. 58] the day. Now, certainly that indicates the true nature of what occurred one week ago when there were a couple of hundred people in the courtroom.

Then there was a report quoted in Mr. Henson's affidavit, but not argued by Mr. Henson, that prejudice was shown because the newspaper reported that someone had swung at Mrs. Duncan with a purse, tried to strike her. The affidavit from the Sheriff, which is on file here, says that he investigated this alleged incident and talked to all kinds of people, newspaper men, officials, spectators, and so forth, and nobody can be found by him who reported seeing any such thing and the only information that reached his ears that any such thing happened was a report by Mr. Sullivan's investigator, Mr. Lewis, that this had occurred.

Now, Mr. Henson in his affidavit says that I represented to the Court that the trial should be had within 30 days and insisted that I had a right to a quick trial. I am not going to go into all of that because I have set forth the law precisely in my affidavit. The Penal Code Section which does state that the trial shall be had within 30 days and also the Penal Code section which states that the People of the State of California have a right to a trial as soon as possible, Section 1050 of the Penal Code states that the Court shall set all criminal cases for trial for a date not later than 30 days after the date of entry of the plea of the defendant. Actually, the trial that was set

[fol. 59] today, your Honor, for these two defendants is for a date later than 30 days from the date of entry of their plea that was made here today.

Section 681a of the Penal Code states; "The welfare of the People of the State of California" my client "requires that all proceedings in criminal cases shall be heard and determined at the earliest possible time. It shall be the duty of all courts and judicial officers and of all District Attorneys to expedite the hearing and determination of all such cases and proceedings to the greatest degree that is consistent with the ends of justice."

I would have been derelict in my duty had I not urged to the Court that the trial be set within 30 days and certainly at the earliest possible time in accordance with the Code Section.

Finally, your Honor, I have read many cases on this application for change of place of trial. There is an excellent article in Vol. 44, California Law Review at Page 108. It summarizes the law in a fashion much better than I could if I attempted to do it from the cases. There is a note by Paul Peterson, a capable attorney, and I have checked the cases since this was published in 1956 and there are no additional cases on this point, so everything is in this note and article. And it is clear, first of all, that after over 60 cases in the appellate courts where defendants have complained about the trial judge refusing to order a change in the place of trial, only four in the entire history of California have held that the trial judge [fol. 60] was wrong and should have. There has been only one such case in the last 50 years and only two such cases in the last 80 years, and the facts of those cases, and I won't go into them here, are completely different from the facts in this case.

The facts in the case quoted by Mr. Henson, the only one cited to the Court by Mr. Henson in his argument, People versus McKay, were that the judge of the Superior Court wrote a letter which was published in the newspaper at the very time the trial was starting saying that the defendants were guilty and that the defendant's attorneys had said they were guilty and it would waste the County's money to try the case. Now, that is quite different from this case. It had many different aspects than this case.

There are countless cases, on the other hand, where the facts were similar to the case at bar where the trial court denied the application to change the place of trial and it was upheld.

Furthermore, there has been no case, to my knowledge, in any appellate court reporting on the aspect of either the granting or the denying of this kind of an application made at this time. The time when the applications have been made and considered have been at the time when the jury was being selected. Certainly it is premature at this time for Mr. Henson to assert that we cannot get 12 impartial jurors until we get a group of prospective jurors in here [fol. 61] to see if we can't get 12 impartial jurors.

Moreover, any excitement that may have existed at the time the facts of this event were revealed and the time that I made any statements and the newspaper published any accounts certainly will have subsided by five weeks from now when the trial starts, if there was any to begin with. And I point to the evidence of today's courtroom to indicate that just one week after the first arraignment of the defendants this is how much interest there is in the matter, and I assert that five weeks from now when the trial starts, it will be just five weeks that much older and colder news and interest.

We have not had any difficulties in Ventura County before in getting juries to try cases despite the fact that other cases of murder in which the death penalty was imposed had the facts published beforehand, although I admit that not nearly in the degree that they were published in this case, because this case is more unique and there is more interest in it.

The only difficulty that I have ever had in capital cases in getting a jury was not that the jurors were prejudiced against the defendants or had formed or expressed any opinions that they refused to set aside and refused to agree to listen to the evidence and base their decision on that, the only difficulty we have ever had, and I suspect we will have it in this case, is that I can't get jurors who do not have conscientious opinions against the death penalty [fol. 62] or jurors who will not accept circumstantial evidence. The difficulty has been not in the defense side, but in the prosecution's side.

Consequently, to sum up, your Honor, I believe that it is quite apparent, after your Honor considers the affidavits of the defendants, that there is nothing in any of them that goes to the precise question involved: Can we get 12 persons who will, despite their opinions, listen to the evidence and hear the case with impartiality? There isn't a single statement in that affidavit by a declarant saying he wouldn't do such a thing. There isn't a single statement in an affidavit by a declarant that says that anybody else wouldn't do such a thing. All they are are broad, generalized statements by declarants saying, Rev. Gilbert, Rev. Gressett, the attorneys, three attorneys, saying they have talked to a lot of people. A lot of people say that the defendants are all guilty, ought to be executed, and that there is a great deal of prejudice, a legal conclusion, of course, against the defendants, not one single word that goes to the precise point.

And I most respectfully suggest that if this Court has any question whatever about the ability in Ventura County to get 12 decent citizens who will hear this case impartially, at least the decision on that question ought to be deferred and is permitted according to law, as stated in the California Law Review, "The trial court is entitled to deny a motion for change of venue with leave to renew the motion after voir dire."

[fol. 63] I respectfully suggest that if there is any slight doubt in the Court's mind or inclination to believe that there wouldn't be 12 persons in this County that could hear this case, at least the Court ought to defer that matter until we have the jurors in the courtroom and have them examined and see whether we cannot get 12 impartial jurors and, therefore, I respectfully request and urge that the motion for application for change of venue be denied.

REBUTTAL ARGUMENT BY MR. HENSON

Mr. Henson: In answer to that argument by the District Attorney, your Honor, I will just touch upon a few items.

So far as the matter of nothing is illegal is concerned, that is not the question at all. Like I started out to say, every person, regardless of guilt, regardless of the evidence, is entitled to a fair and impartial trial. And it doesn't make any difference whether the publications in

the newspapers, in television or otherwise were true or not. The fact or question of guilt or innocence is not an issue here at this time, and I say you can't have a fair and impartial jury when they know all the facts, when the case has been argued. And as far as everything being true, Mr. Gustafson says himself that this report in the Los Angeles Times that a woman swung at Mrs. Duncan with a purse is false. Well, there was certainly one item, and I think if your Honor will look through those newspapers, you will probably find other items that were false and printed in the newspaper. Whether or not this woman actually swung [fol. 64] at Mrs. Duncan with a purse is immaterial. It was printed and people believed it and it's going to affect their minds. If other people have so much prejudice they swing at somebody with a purse, why, they must be bad people.

As far as prejudice against persons of Mexican-Spanish descent, I have been in this County about four years now and I say this isn't a vital item, but it is something to consider, I think, with all the rest of it, your Honor. The first time I ever heard the phrase "high-class Mexican" was when I moved to this County, and I don't know yet what distinguishes a high-class Mexican from an ordinary Mexican, but it must be something.

As far as the trial within 30 days is concerned, your Honor knows that that is only directory and not mandatory. Sixty days is the mandatory statement.

And as far as this assertion by the District Attorney that our affidavits are not sufficient in that they state what other people have said, I think the District Attorney is well aware that one of the exceptions to the hearsay rule is a statement of mental or physical condition, and this was a statement of mental condition, certainly, of prejudice. And he says we don't have any affidavit from anybody who says "I'm prejudiced." Well, as I pointed out before, I don't have a staff of eight or nine attorneys working for me and I don't have four investigators working for me and I don't have time to devote my whole time to this case. I did the [fol. 65] best we could by trying to get people who had talked to a lot of people. As I say, these affidavits are from upstanding, honest people in this community.

I say the motion or application is not premature.

As far as the sentiment or prejudice subsiding by the time of trial, I think as far as court or judicial procedures are concerned, the trial is just around the corner. Five weeks away, that may sound like a lot to a kid going to school, but to a lawyer it is not very long when he has got other cases to consider.

As far as the People are concerned, as Mr. Gustafson said, well, nothing appeared in great detail before the Grand Jury transcript was released, but that means, first of all, they got it once from the officer, the officer's statement to the newspapers; secondly, they have got a more detailed analysis of the testimony from the Grand Jury, and then right on top of it now we are going to have the trial. And I say it won't be a trial. The trial has already been held in this County.

I asked your Honor to give this some very serious thought with all the things in mind that I pointed out on my initial argument. Thank you.

Mr. Danch: I have only one more thing to say, your Honor. Mr. Gustafson has placed some emphasis on the fact that the courtroom is only half full. I think the record should show there is a police officer outside the door keep-[fol. 66] ing people out and that probably accounts for the diminished size of the crowd.

The Court: There is nobody keeping the people out as long as there is seating capacity. We have limited the courtroom today to the seating capacity, that's all.

Mr. Danch: The Deputy Sheriff informed me, your Honor, that he is keeping people out.

The Court: Well, regardless of what the Sheriff tells you, I made an order to that effect and that is what counts and I know that they were going to allow an audience to the extent of the seating capacity. I wouldn't consider that matter of very much importance, anyway.

Mr. Henson: Your Honor, I neglected to say, I just happen to note the Reporter has been going steadily for an hour and a half and probably is tired and would want to take a recess at this time.

Mr. Gustafson: I am ready to conclude.

The Court: Is there anything further?

Mr. Henson: Nothing further from me.

Mr. Danch: Nothing further.

REBUTTAL ARGUMENT BY MR. GUSTAFSON

Mr. Gustafson: I have just about two sentences and I am through.

I just want to say that while Mr. Danch said that he conceded there was nothing illegal, improper in what I did, legally, any statement I may have made, Mr. Henson now says well, that is beside the point, whether it is legal or not, [fol. 67-68] the only reason I argued the legality and stated it in my affidavit is because in his affidavit he says that we clearly overstepped the bounds of legal propriety, and I deny that we overstepped the bounds of any legal propriety.

Secondly, with respect to the sufficiency of the affidavits, naturally, I do not attack them as insufficient because they are reporting the state of mind of others. I am attacking them as being, attacking the credibility of them and pointing out how impossible it is for me to counter them because not one of these persons had the nerve or the information, or whatever the reason might be, to name any person who said he had formed an opinion. They are all in general terms that persons have talked to me about it and formed an opinion. There isn't one name mentioned. I don't ask Mr. Henson to get an affidavit from a person stating his prejudice, but I would certainly like to have an affidavit by somebody naming the man, naming one man out of 170,000.

That's all, your Honor. I submit the matter.

* * * * * * *

[fol. 69] IN THE SUPERIOR COURT OF VENTURA COUNTY,
MEMORANDUM DENYING MOTIONS FOR REMOVAL

The Court: All right, People versus Luis Estrada Moya and Augustine Baldonado.

Mr. Deem: Ready for the People, your Honor.

Mr. Henson: Ready for defendant Moya, your Honor, who is present in court.

Mr. Danch: Ready for defendant Augustine Baldonado, also present in court.

The Court: Both of the defendants are present, are they not?

Mr. Henson: That is correct, your Honor.

The Court: All right. "In the Superior Court of the State of California, in and for the County of Ventura. The People of the State of California, Plaintiff, versus Elizabeth Ann Duncan, Luis Estrada Moya and Augustine Baldonado, Defendants.

"Order: Luis Estrada Moya and Augustine Baldonado on the 26th day of December, 1958 were indicted by the Grand Jury of Ventura County and accused of murdering Olga Duncan on November 17th, 1958.

"Burt Henson has by this Court been appointed to defend Luis Estrada Moya and John Danch has by this Court been appointed to defend Augustine Baldonado.

"The defendants have been duly arraigned and each has [fol. 70] caused his plea of not guilty and not guilty by reason of insanity to be entered. The case has been regularly set for trial before a jury, trial to begin on the 16th day of February, 1959.

"Each of said attorneys has, on behalf of his client, filed a motion for change of venue on the alleged ground that the defendants cannot receive a fair and impartial trial in the County of Ventura.

"It seems that in filing his motion for a change of venue, each of the defendants has complied with Sections 1033 and 1034 of the Penal Code as to form.

"A hearing of the motion was duly and regularly noticed as required by law and the applications came on for hearing pursuant to said notice on Tuesday morning, January 13, 1959, at 9:30 o'clock A.M. of that day. Burt Henson appeared for his client, Luis Estrada Moya; John Danch appeared for his client, Augustine Baldonado; and Roy A. Gustafson, the District Attorney of Ventura County, appeared for the People of the State of California.

"The attorneys for the defendants vigorously contend that because of so much publicity having been given through the local press the people of Ventura County have become so inordinately inflamed that a jury cannot be obtained which will give the defendants a fair and impartial trial. And in support of their contention they have filed numerous affidavits and many copies of local and other newspapers [fol. 71] containing articles about the case.

"Each of the attorneys for the defendant has been diligent, industrious and able in presenting his motion for change of venue and Mr. Gustafson has replied to them with admirable ability.

"This Court has carefully read and examined all of the affidavits submitted and has read all of the newspaper articles above referred to. And after carefully analyzing all of the material submitted to me and after diligently and thoughtfully considering the entire case as far as it has developed up to the present time, I am unable to agree with the counsel for defendants in their contention that the defendants cannot receive a fair and impartial trial in Ventura County.

"It is a sad commentary on the integrity, decency and humanity of the people of Ventura County to say that defendants, whose very lives may be at stake, cannot receive a fair and impartial trial in this County.

"If I had the slightest doubt in the world about the ability of the defendants to receive a fair trial in Ventura County I would without the slightest hestitation grant the motions for a change of venue.

"But since I have no such doubt the motions are, and each of them is, denied without prejudice to a renewal thereof after voir dire.

"Done this 15th day of January, 1959. Charles F. [fols. 72-75] Blackstock, Judge of the Superior Court."

You file this affidavit and serve each of the attorneys with a copy of it. You will have to get those copies from my secretary.

Mr. Henson: Excuse me. Your Honor, from your comments I want to make it clear that by making my motion I was in no way reflecting or degrading the character of the people of Ventura County. That was not intended and I didn't ever want to convey that impression. The only impression that I wanted to convey is that as far as I am concerned the people in Ventura County are the best in the world, but that they are human and are going to be prejudiced just like anyone else would be. I hope that is clear in Your Honor's mind.

The Court: Oh, that didn't require any explanation by you. When I said it is a sad commentary on the integrity,

and so forth, of the people of Ventura County, I didn't intend that the statement on my part should reflect in any way upon the attorneys or upon the parties.

Mr. Henson: Thank you.

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[fol. 75-a-1] In the Superior Court of Ventura County

Ventura, California, February 10, 1959.

Colloquy Between Court, Defendant and Counsel on Withdrawal of Not Guilty Plea

The Court: People versus Augustine Baldonado.

Mr. Danch: In this matter, your Honor, the defendant has on a prior occasion entered a plea of not guilty and not guilty by reason of insanity. At this time the defendant wishes to withdraw his plea of not guilty and allow the plea of not guilty by reason of insanity to stand.

The Court: That is right, Mr. Baldonado? That is what you want to do?

Defendant Baldonado: Yes.

The Court: All right, that is permitted.

Mr. Danch: The defendant will further stipulate——

The Court: The pleas of not guilty is withdrawn.

Mr. Danch: The defendant will further stipulate, your Honor, that the murder is murder in the first degree.

The Court: All right.

Mr. Gustafson: Do you so stipulate, Mr. Baldonado? Do you agree with——

Defendant Baldonado: Yes.

Mr. Gustafson: —what your attorney said? Murder in the first degree.

The Court: Do you so stipulate, Mr. Baldonado?

Defendant Baldonado: That's right.

The Court: All right.

[fol. 75-b-1] Mr. Danch: That leaves the question——

Mr. Gustafson: We so stipulate.

Mr. Danch: We now request, your Honor, that the matter be set for trial separately from the other defendants.

Mr. Gustafson: I have no objection to that, your Honor. I would suggest the date of April 6th, which is available.

The Court: Well, let's find out if it is available.

Calendar Clerk: We have People versus Bryant set for April the 6th.

Mr. Gustafson: It is not likely to go.

The Calendar Clerk: All right then.

The Court: What?

The Calendar Clerk: We have People versus Bryant set for April the 6th and Mr. Gustafson said it is not likely to go, so that day is all right.

The Court: All right, we can set that one some other day, if necessary. We will set this case, People versus Baldonado, April 6th.

Mr. Gustafson: Is that a Monday?

The Calendar Clerk: Yes.

The Court: Monday, April 6th, 10:00 a.m. All right, remanded.

The Calendar Clerk: The number of jurors:

Mr. Gustafson: I would say a hundred.

The Court: A hundred. Let a hundred names be drawn.

[fol. 75-a] In the Superior Court of Ventura County

Ventura, California, Tuesday, April 14, 1959, 9:30 A. M.

Argument on and Denial of Motion for New Trial.

The Court: We had better take care of the Baldonado first, hadn't we?

Mr. Gustafson: I believe so, your Honor.

The Court: Mr. Baldonado, stand up.

Mr. Danch: Your Honor, at this time I wish to make a motion for a new trial on several grounds in this matter. The motion is based on subsection 5, in that the Court made a mistake and misdirected the jury in failing to give the cautionary instruction on oral admission. This instruction is that the jury is to be instructed on all proper occasions by the Court that evidence of oral admissions by a party should be viewed with caution. That is Section 2061, subsection 4, of the Code of Civil Procedure.

In the course of the trial, Dr. Harvey testified, and on cross examination Mr. Gustafson asked him a number of questions about the defendant's past record, which was

based on what the defendant told Dr. Harvey, or purported to have told Dr. Harvey.

On page 325 of the Transcript, Dr. Harvey said, "That is what he said."

And then Mr. Gustafson said, "That is what he said. That is what I'm asking about, his history, of what he said."

And he went over the whole question of his past life. [fol. 75-b] Now, I thought Mr. Gustafson was asking those questions more or less in the manner of attacking Dr. Harvey's opinion, but then, in his argument, he did argue those facts which were introduced solely by Dr. Harvey, telling what Mr. Baldonado had purportedly told him; so they were, in fact, oral admissions, and they were argued as such by Mr. Gustafson.

Now, this instruction is one that has to be given, whether requested by the defendant or not, and ordinarily, it has been held not to be reversible error; however, the question has arisen, of course only on the question of guilt, since this three-part trial is a new procedure in California, and on the question of guilt, it was held that where the question of guilt or innocence depends largely upon the application of the evidence of the declarations of the defendant, the failure to give such an instruction may furnish grounds for a reversal. In the case of the People against Bemis, 33 California (2d) 395, the case, in fact, was reversed for that reason alone, failure to give that cautionary instruction.

On this case here, of course, we are not concerned with guilt or innocence, but punishment, but I think, by analogy, the same rule applies, and Mr. Gustafson, of course, did argue two points: one, the nature of the crime itself, and, segondly, the background of the defendant as shown by these oral admissions; so I think the case is such that the cautionary instruction should have been given, failure to give it was error, and I think it should be considered by [fol. 75-c] the Court very seriously at this time.

The second basis for the new trial is that the Court erred in the decision of the question of law arising here in the course of the trial in that pictures of Olga Duncan were admitted into evidence. Again we have the problem of a different type of trial here.

This is not a question of guilt or innocence, but of punishment. Ordinarily, in a trial where the guilt and innocence is concerned, admission of pictures, of course, is discretionary with the Court, but if all of the facts which the picture would tend to prove are already proven by other evidence, and the picture is particularly gruesome, its only purpose is to inflame and prejudice the jury. But although, I suppose, under this three-part trial, the factors of indignation might be considered by the jury, I still think a picture that is intended only to inflame the jury, as those pictures of Olga Duncan were intended, was prejudicial and should not have been admitted.

Third, the second subsection of the statute, I bring the motion under subsection 6, that the verdict was contrary to the evidence, and that the mental condition of the defendant was shown by uncontradicted evidence to be such that, in my opinion, he should not have been sentenced to death. And if the Court so finds under that section, of course, the Court can reduce the punishment from death to life imprisonment.

[fol. 75-d] I at this time move, as I say, under two subsections of the statute, subsection 5 and subsection 6, in that the jury was misdirected, that the Court erred in permitting the jury to inspect the pictures, and, under subsection 6, that the verdict was contrary to the evidence in that the defendant's mental condition was uncontradictably shown to be such that it is wrong to sentence him to death.

The Court: What do you have to say, Mr. District Attorney?

Mr. Gustafson: Your Honor, I think that none of the points is well taken with respect to the oral admissions and the cautionary instruction that obviously is contended for, and the cases so far decided have not gone beyond the question of guilt of the defendant. A jury is to view with caution what purports to be an oral admission of a defendant because it is so easy to misstate in orally testifying what a defendant may have said with respect to his guilt of the crime. I have never heard of this proposition going beyond the question of guilt or innocence. And here we have a situation where the defendant has already pleaded guilty, so it is inappropriate.

I think the fact that that is true is indicated, first of all, by the fact that no request was made for such an instruction by Mr. Danch. This is an afterthought now.

Furthermore, it appears to me, in fact, that there could be no prejudice whatever from the lack of any such instruction, even if the law stated that such were necessary in a [fol. 75-e] case of this type, because there was no attempt to deny the truth of the testimony of the defendant's own witness, Dr. Harvey, who was not my witness but his witness, who related these admissions made by the defendant. And the defendant himself never took the stand to deny that he had, in fact, done these things which Dr. Harvey said that he admitted doing. So, even if the law were such that such an instruction were required, there would be no miscarriage of justice by reason of it.

The matter with respect to the pictures of Olga Duncan, I think that the number of pictures introduced and the type of those pictures could not possibly be considered to be inflammatory. They were merely descriptive of the manner in which the crime was committed, which is admissible under the law.

As a matter of fact, I withdrew a picture, at least one picture, which I think clearly could have gone into evidence had I insisted upon it, but just to accommodate counsel and because he was making that protest, I withdrew it.

The only pictures involved were the picture of Olga Duncan as she appeared when she was living, and the picture of Olga Duncan in the position in which she was placed in the grave by the defendant.

As far as the verdict being contrary to the evidence, I think it is quite clear that the jury had the discretion to impose the penalty which it did impose, and that certainly [fol. 75-f] the jury is not required by any rule of law, because of the fact that the defendant, by uncontradicted evidence, may be a sociopathic personality, the jury is not required by any rule of law, for that reason, to impose life imprisonment as a sentence.

I respectfully ask that the motion be denied.

The Court: Do you have anything further to say, Mr. Danch?

Mr. Danch: Well, your Honor, as Mr. Gustafson said, this matter of oral admissions was intended to apply

solely to guilt or innocence, and the statement has only been applied to that. Of course, it means nothing, because there hasn't been an opportunity in this State for the question to be applied to a trial on the question of penalty alone.

By the nature of this amendment to the Penal Code which divides the trial into three phases, our whole law of evidence has to be re-examined and adjusted and used by analogy to this particular situation. The mere fact that it hasn't been used before means nothing, because there has been no opportunity to use it.

The fact that I didn't ask for the instruction has no bearing whatsoever, because the law is such that, if the instruction is appropriate, it has to be made whether requested by the defendant or not. So that is of no importance.

The Court: The motion for a new trial is denied.

[fol. 75-g] Stand up, Mr. Baldonado.

You were indicted by the Grand Jury of this County on December 26, 1958, for the crime of murdering Olga Duncan. To this Indictment you originally entered your pleas of not guilty and not guilty by reason of insanity. You later withdrew your plea of not guilty, and on April 6, 1959, you withdrew your plea of not guilty by reason of insanity, and entered a plea of guilty to the charge of murder. You and your counsel stipulated that the murder was of the first degree.

Trial by jury on the issue of penalty for the crime you committed began April 6, 1959, and on April 9, 1959, the jury returned its verdict, fixing your penalty at death.

I have today denied your motion for a new trial, and I decline to exercise any power I have, under the provisions of subdivision 7 of Section 1181 of the Penal Code, to reduce your punishment from death to life imprisonment.

This is the time heretofore fixed for pronouncing judgment against you.

Do you have any legal cause to show why judgment should not be pronounced against you?

The Defendant: No, I don't.

The Court: You say no.

It is the judgment of this Court that you be sentenced to die by the administration of a lethal gas.

You are hereby remanded to the custody of the Sheriff of [fol. 75-h] this County for delivery to the Warden of the California State Prison at San Quentin.

This Court will now sign the commitment, pursuant to Section 1217 of the Penal Code, and deliver it to the Sheriff.

You are remanded to the Sheriff.

[fols. 76-78] IMPANELLING OF JURY

The Court: People versus Baldonado.

Mr. Gustafson: Ready for the People, your Honor.

Mr. Danch: Ready for the defendant.

The Court: All right, call the names of this jury panel.

The Clerk: Ladies and gentlemen, as I call your name would you please answer by stating the number of miles you travel one way to the courthouse this morning? If you live in Ventura, just answer "Ventura", please, and if any of you require letters for your employers, let me know when I call your name and we will send out cards for you.

(Names of prospective jurors called.)

The Clerk: Is there anyone who was summoned as a juror whose name I did not call? There are two absentees who were excused by stipulation.

The Court: Put the names in the box.

The Clerk: Two names are missing, your Honor.

The Court: Give them to the Bailiff.

The Clerk: As I call your name, please step forward and the Bailiff will seat you in the jury box.

Ralph A. Openshaw, O-p-e-n-s-h-a-w.

The Court: Don't stand up in the courtroom.

[fol. 79] The Clerk: Urban, U-r-b-a-n, Joe Berg, B-e-r-g; Phylis E. Beesley, B-e-e-s-l-e-y; Daryl M. Case, C-a-s-e; Richard E. Ely, E-l-y; William J. Paredes, P-a-r-e-d-e-s; Robert W. Tyrrell, T-y-r-r-e-l-l; Bernard Donlon, D-o-n-l-o-n; Herbert C. Bonaventura.

The Prospective Juror: "E" not "a".

The Clerk: Bonaventura, B-o-n-a-v-e-n-t-u-r-a?

The Prospective Juror: U-r-e.

The Clerk: Excuse me. How do you pronounce it?

The Prospective Juror: Bonaventure.

The Clerk: Bonaventure. I am sorry. That makes quite a difference.

Mr. Gustafson: You are not doing very well.

The Clerk: That is the way they are here. Myron Roy Hubble, H-u-b-b-e-l-l; Evelyn Gardner, G-a-r-d-n-e-r, Mrs. Bogetti. How do you pronounce the first name?

The Prospective Juror: Wovwiece.

The Clerk: W-o-v-w-i-e-c-e?

The Prospective Juor: Correct.

The Clerk: Thank you.

Will you all stand and raise your right hands and be sworn, please?

(Prospective jurors in box sworn.)

The Clerk: You may be seatetd, please.

The Court: Ladies and gentlemen of this prospective jury, this is the case of the people of the State of California [fol. 80] versus Augustine Baldonado.

The Grand Jury of Ventura County indicted him for murder and he is now on trial.

He has pleaded guilty to the charge and he is on trial only as to the penalty; is that correct?

COLLOQUY BETWEEN COURT AND COUNSEL RE PLEA

Mr. Gustafson: No, your Honor, it is not correct. He pleaded not guilty by reason of insanity.

The Court: That is, he pleaded not guilty by reason of insanity, that's right, but he has not otherwise pled and the matter before us today is still the question of insanity, is it?

Mr. Danch: At this time, your Honor, the only question is that of penalty.

The Court: That is what I thought.

Mr. Danch: This is the trial on penalty.

Mr. Gustafson: This jury would try both issues, penalty and sanity.

The Court: I know they could, but they don't have to, do they, if he waives a trial, if he waives his plea of sanity?

Mr. Gustafson: Well, if he did that, but he hasn't done that.

The Court: Well, I understand his attorney to be doing it now. Am I right or not?

Mr. Danch: Yes, if it will simplify matters, your Honor, at this time we can withdraw the plea of not guilty by reason of insanity, and we do so at this time.

[fol. 81] The Court: That's right, Mr. Baldonado? That is right, is it, Mr. Baldonado?

The Defendant: That's right.

The Court: He says "Yes."

Mr. Gustafson: Your Honor, I object to his withdrawing the plea of not guilty by reason of insanity unless there is a plea entered in substitution thereof. Otherwise, it would leave the proceeding with no plea entered.

The Court: Well, what could he do? He doesn't plead now. He does not plead insanity.

Mr. Gustafson: Well, but he cannot withdraw his plea of not guilty without entering some different plea; namely, guilty.

Mr. Danch: Originally, your Honor, there was a plea of not guilty and not guilty by reason of insanity entered. Subsequently Mr. Baldonado withdrew his plea of not guilty and stipulated there was a murder of first degree committed and then now withdraws the plea of not guilty by reason of insanity.

Mr. Gustafson: That leaves no plea entered whatever, your Honor, and that would mean that the case would go to trial on the basis of the defendant's standing mute and it would be a trial on the issue of fact as to whether he was guilty or not.

The Court: Well, he is entitled to a trial on the question of penalty, isn't he?

[fol. 82] Mr. Gustafson: Yes, he is, your Honor, but the thing is he isn't—that issue isn't reached until his guilt is determined, and if he now withdraws the only plea that is entered, there will be no plea entered and he cannot be tried on the issue of penalty without having a conviction of guilt either by plea or by verdict.

The Court: Well, in that event he would have to plead guilty to the original charge.

Mr. Gustafson: Right. That is why I say I object to any order permitting him to withdraw the plea of not guilty by reason of insanity unless it is coupled with an entry of a plea of guilty to first degree murder.

The Court: I understood that to be the intention of the——

Mr. Gustafson: Well, I didn't so understand.

The Court: He would have to plead—there would have to be a plea, that is a certainty. I assumed, though, that he was pleading guilty to the charge and that the only thing left was what is the penalty, and that is up to the jury.

Mr. Danch: That is our intention, your Honor.

The Court: What?

Mr. Danch: That is the intention.

The Court: That was the intention, wasn't it?

Mr. Danch: Yes.

The Court: Well, Mr. Baldonado, stand up. You now plead guilty to the charge, to the indictment, as I take it, and you are to go to trial before this jury on the single [fol. 83] question of what shall the penalty be?

The Defendant: That is correct.

Mr. Gustafson: And is he personally entering the plea of guilty?

The Court: Yes, he says he does, anyway.

You plead guilty, don't you, to the indictment?

Mr. Gustafson: He did not say "I plead guilty."

The Court: I understood him to say, in answer to my question I understood him to say, "Yes."

Mr. Gustafson: Yes, but that isn't in the wording——

The Court: Do you plead guilty to the indictment?

The Defendant: Yes.

The Court: He says "Yes."

Now we have a plea of guilty to the indictment and he does not plead insanity. The only question left is what shall the penalty be.

Mr. Gustafson: Now, as I understand it, the defendant heretofore made stipulation that the plea of guilty is to murder in the first degree remains in effect. May the Court ask the defendant if that is true?

The Court: That is the way I understand it. Isn't that right, Mr. Danch?

Mr. Danch: That is correct.

The Court: Mr. Baldonado, that is correct, isn't it?

The Defendant: That is correct.

The Court: Yes. The situation now is just the same [fol. 84] now as if there had never been but one plea, and that a plea of guilty to the indictment.

Mr. Gustafson: Yes.

The Court: Then the question is what shall the penalty be and that's all there is to the case.

Mr. Gustafson: Plea of guilty to the indictment with the further stipulation that the degree of the offense is first degree.

The Court: Yes. That is right, Mr. Danch, is it not?

Mr. Danch: That is correct.

The Court: Yes, now, will it be stipulated that I may inquire of the various members of this jury as to whether or not they have conscientious scruples as to the death penalty?

Mr. Gustafson: Yes, your Honor, so stipulated.

Mr. Danch: So stipulated.

COURT'S QUESTIONING OF PROSPECTIVE JURORS

The Court: Mr. Openshaw, is it?

The Prospective Juror: Yes.

The Court: I want the jury to answer this question very carefully and thoughtfully. Don't be precipitate about it, just take your time and answer the question.

Mr. Openshaw, do you have any conscientious scruples about inflicting the death penalty?

The Prospective Juror: No.

The Court: In any case? What?

The Prospective Juror: No.

The Court: Mr. Berg, do you have any conscientious [fol. 85] scruples about inflicting the death penalty?

The Prospective Juror: No.

The Court: Is it Miss or Mrs.?

The Prospective Juror: Mrs.

The Court: What?

The Prospective Juror: Mrs.

The Court: Miss?

The Prospective Juror: Mrs.

The Court: Mrs. Phyllis E. Beesley?

The Prospective Juror: Right.

The Court: Do you have any conscientious scruples about inflicting the death penalty?

The Prospective Juror: No.

The Court: Mr. Case, do you have any conscientious scruples about inflicting the death penalty?

The Prospective Juror: No.

The Court: Mr. Ely, do you have any conscientious scruples about inflicting the death penalty?

The Prospective Juror: No.

The Court: Mr. —— what is it, Paredes?

The Prospective Juror: Parades.

The Court: Parades.

The Prospective Juror: That is good enough.

The Court: Mr. Paredes, do you have any conscientious scruples——.

The Prospective Juror: No.

[fol. 86] The Court: —against inflicting the death penalty?

The Prospective Juror: No.

The Court: Mr. Tyrrell, do you have any conscientious scruples about inflicting the death penalty?

The Prospective Juror: No.

The Court: Mr. Donlon, do you have any conscientious scruples about inflicting the death penalty?

The Prospective Juror: No.

The Court: Mr. Bonaventure, is it?

The Prospective Juror: Yes, your Honor.

The Court: Do you have any conscientious scruples against inflicting the death penalty?

The Prospective Juror: Yes, your Honor.

The Court: What?

The Prospective Juror: Yes, your Honor.

Mr. Gustafson: I challenge him for cause, your Honor.

The Court: All right, you are excused. Call another name. Wait a minute. Will it be stipulated that Mr. Gordon King, who seems to have a very legitimate excuse, may be excused?

Mr. Danch: So stipulated.

Mr. Gustafson: So stipulated.

The Court: All right, you are excused. Call another name.

The Clerk: Robert P. Baxter, B-a-x-t-e-r.

The Court: Mr. Baxter, do you have any conscientious [fol. 87] scruples against inflicting the death penalty?

Mr. Gustafson: Your Honor, that prospective juror has not been sworn.

The Clerk: Excuse me.

The Court: All right, I thought he had been.

The Clerk: I'm sorry.

(Prospective juror sworn.)

The Court: Do you have any conscientious scruples against inflicting the death penalty, Mr. Baxter?

The Prospective Juror: Well, I believe I do, yes.

The Court: You are excused. You challenge him for cause, don't you?

Mr. Gustafson: Yes, challenge for cause.

The Court: You are excused. Call another name.

The Clerk: Robert A. Houle, H-o-u-l-e.

(Prospective juror sworn.)

The Court: How do you pronounce your name?

The Witness: Houle, sir.

The Court: Houle?

The Prospective Juror: Houle.

The Court: Do you have any conscientious scruples against the death penalty?

The Prospective Juror: No.

The Court: No?

The Prospective Juror: No.

The Court: All right, Mr. Hubbell, is it?

[fol. 88] The Prospective Juror: Yes.

The Court: Do you have any conscientious scruples against inflicting the death penalty?

The Prospective Juror: No.

The Court: Evelyn Gardner, is that Miss or Mrs?

The Prospective Juror: Miss.

The Court: Miss? Do you have any conscientious scruples against inflicting the death penalty?

The Prospective Juror: I'm afraid so.

The Court: What?

The Prospective Juror: I'm afraid so.

Mr. Gustafson: Challenge for cause.

The Court: All right: you are excused. Call another name.

The Clerk: Elaine V. Anderson, A-n-d-e-r-s-o-n.
The Court: Mrs.?
The Clerk: Mrs. Anderson?
The Prospective Juror: Yes, that's right.

(Prospective juror sworn.)

The Clerk: Your Honor, I understand that Mr. Rosen has just come into the court, Albert L. Rosen.
The Court: All right, will it be stipulated that his name go in the box?
Mr. Danch: So stipulated.
Mr. Gustafson: Yes, your honor.
The Court: All right, put his name in the box.
[fol. 89] Mrs. Anderson, do you have any conscientious scruples against inflicting the death penalty in a murder case?
The Prospective Juror: No.
The Court: W. Bogetti, is that Miss or Mrs.?
The Prospective Juror: Mrs.
The Court: Mrs.?
The Prospective Juror: Yes.
The Court: Do you have any conscientious scruples against inflicting the death penalty in a murder case?
The Prospective Juror: Yes, your Honor.
The Court: You are excused. You challenge for cause, don't you?
Mr. Gustafson: Yes, your Honor.
The Court: All right, call another name.
The Clerk: Gwendolyn Hanson. Is that Mrs.?
The Prospective Juror: Mrs.
The Clerk: Mrs. Hanson, H-a-n-s-o-n.

(Prospective juror sworn.)

The Court: Mrs. Hanson, do you have any conscientious scruples against inflicting the death penalty?
The Prospective Juror: Did you say me?
The Court: What?
The Prospective Juror: Did you say Mrs. Hanson?
The Court: Did you say yes?
The Prospective Juror: No, sir.
The Court: I don't understand you.
[fol. 90] The Prospective Juror: No, sir.

The Court: No?
The Prospective Juror: No.
The Court: All right, you may inquire.

Voir Dire Examination of Jurors.

Mr. Danch:

Q. Mr. Openshaw, what is your occupation?
A. Oil worker.
Q. Do you know generally what this case is about?
A. What I've read in the paper.
Q. You know it is what is popularly referred to as the "Duncan murder case"?
A. Yes.
Q. Involving the death of Olga Duncan?
A. Yes.
Q. And have you followed the trial of Mrs. Elizabeth Duncan?
A. Not too closely.
Q. You do know what the result of that trial was?
A. Yes.
Q. Have you formed any opinion from what you have read as to what you feel the fair penalty for Mr. Baldonado is?
A. Yes.
Q. What is that opinion?
A. Death.
[fol. 91] Q. Now, do you think that there is any evidence that could be brought in that would change your opinion?
A. No.
Q. No matter what we said or did, you would still have that opinion?
A. Yes.

Mr. Danch: I challenge this juror for cause, your Honor.
The Court: Do you resist that challenge?
Mr. Gustafson: Yes, I do.
The Court: All right, inquire.
Mr. Gustafson: I think, first of all, before I inquire, your Honor, I would like to say this, that with respect to this matter the penalty is solely at the discretion of the jury. There is no need of any proof one way or the other.

Neither side may put in any evidence, so that any question based upon what the evidence might or might not do is purely speculative.

Let me ask the Juror, these questions then. Mr. Openshaw, this is a case where the sole function for this jury will be to decide whether Mr. Baldonado should receive a sentence of life imprisonment or the death sentence. You say you have an opinion based on what you read in the newspapers and what you have heard about the case that his sentence ought to be the death sentence. Now, are you willing, if you were selected to serve as a juror, to consider whatever evidence was put in, either by Mr. [fol. 92] Danch on behalf of Mr. Baldonado, or by me on behalf of the People of the State of California, in reaching your verdict as to whether you would fix the penalty at death or life imprisonment?

A. Yes.

Q. You would consider that evidence?

A. Yes.

Q. So that if after consideration of that evidence you came to the conclusion that he should receive a life sentence rather than the death penalty, you wouldn't hesitate to so vote; is that right?

A. Yes.

Q. In that respect then you will base your verdict on the facts of the case and whatever evidence is presented before you decide?

A. Yes.

Mr. Gustafson: I submit he is not disqualifed, your Honor.

Mr. Danch:

Q. Mr. Openshaw, when I asked you if there could be any evidence that would be brought in that would change your mind, you said, "No."

A. I didn't understand you.

Q. I said when I asked you before this time that whether or not there was any evidence that could be brought in here that would change your mind, your answer so that question was "No", is that true?

[fol. 93] A. As far as I know the case now, it is true.

Q. When you say that you would consider the evidence, you mean that you would consider it, but you would still vote for the death penalty; is that true?

A. You can alter—I can alter myself, sure, under the conditions, but as I understand the case now, I would vote the death penalty.

Q. You do feel that your opinion might be changed by the introduction of some evidence that might touch you or appeal to you causing you to change your mind?

A. My opinion can be changed any time, if I am so convinced.

Q. You don't feel at this time that your mind is irrevocably made up for the death penalty?

A. From the information that I have it is made up.

Q. But is it irrevocably or unchangeably made up?

A. It could be changed.

Q. Then in your answer to my first question then you think that you misunderstood my question or have you changed your mind?

A. No, I didn't misunderstand your question, I am only giving from what I know now of the case.

Q. Are you married, Mr. Openshaw?

A. Yes, sir.

Q. Do you have children?

A. Yes.

[fol. 94] Q. Do you know Mr. Gustafson here, the District Attorney?

A. No.

Q. Do you know any of his Deputies?

A. Sir?

Q. Do you know any of his deputies personally?

A. No.

Q. Have you ever served on a criminal jury before, Mr. Openshaw?

A. No.

Q. How long have you lived in Ventura County?

A. Two years.

Q. Where did you reside prior to that time?

A. L.A. County.

Q. Has your information on this case been derived solely from what you have read and heard over the radio?

A. Yes.

Q. Have you discussed it at all?
A. No.
Q. Or anybody purporting to know anything about the case personally?
A. Oh, I may have worked with men that discussed it, yes.
Q. Nobody purporting to know some official information on the case?
A. No.

[fol. 95] Mr. Danch:

Q. Mr. Berg, you live in Camarillo?
A. Right, Heights.
Q. Do you know Mr. Baldonado?
A. No, I'm afraid not.
Q. I presume that you have heard a lot about this case?
A. Yes.
Q. Have you formed an opinion as to what the penalty should be in this case?
A. Not definitely, no.
Q. Have you given any thought at all to it or have you formed any opinion during the course of Mrs. Duncan's trial? Have you thought about it at all?
A. I didn't follow it too close.

The Court: Just a moment. A lot of people came in there.
Mr. Openshaw, you understand that this defendant has pled guilty to murder in the first degrees, do you not?
The Prospective Juror: Do I understand?
The Court: What?
The Prospective Juror: I didn't hear you.
The Court: You understand that this defendant Baldonado had pled guilty to murder in the first degree?
The Prospective Juror: Yes.
The Court: And there is only one question to be decided here.
[fol. 96] The Prospective Juror: Yes.
The Court: Either death or life imprisonment, you understand that?
The Prospective Juror: Yes.

The Court: It has got to be one or the other. The jury at their discretion can make it either one or the other. You understand that?

The Prospective Juror: Yes.

The Court: Now, you say that you have an opinion that the penalty should be death; is that right?

The Prospective Juror: Yes.

The Court: That is your present opinion?

The Prospective Juror: Yes.

The Court: Now, after you hear the evidence in this case—in the first place, will you listen carefully and attentively to all of the evidence that may be adduced in this case? You will listen to the evidence that may be adduced here, won't you, notwithstanding your opinion?

The Prospective Juror: Yes.

The Court: Then you will determine from that evidence, will you not, whether to inflict the death penalty or not?

The Prospective Juror: Yes.

The Court: From that evidence alone; is that right?

The Prospective Juror: Yes.

The Court: All right.

Mr. Danch: What is your ruling on the challenge for [fol. 97] cause, your Honor?

The Court: On Mr. Openshaw?

Mr. Danch: Yes. Yes didn't have a ruling.

The Court: The challenge is denied. Challenge disallowed.

Mr. Danch: You know, Mr. Berg, that Mrs. Duncan was sentenced to death?

A. Yes.

Q. And you know that Mr. Baldonado is a co-defendant?

A. Yes.

Q. Do you feel that because Mrs. Duncan was sentenced to death that Mr. Baldonado necessarily must be sentenced to death also?

A. Not necessarily, no.

Q. You will listen to the evidence which comes into this hearing and form your opinion on that evidence, will you?

A. That is the idea.

Q. Have you discussed this matter with any persons who purported to have some firsthand knowledge of the case?

A. No.

Q. Do you know the District Attorney, Mr. Gustafson?

A. No, I don't.

Q. Do you know me?

[fol. 98] A. Pardon?

Q. Do you know me?

A. I'm trying to place you. I don't think I know you very well.

Q. I think we met somewhere, but I can't remember where. Now, do you know any of Mr. Gustafson's Deputies personally?

A. No.

Q. Whatever opinions you have about this matter were derived from what you read in the paper, heard over the radio and discussed with your friends; is that correct?

A. Yes.

Q. What is your occupation, Mr. Berg?

A. Maintenance foreman.

Q. Where?

A. Oxnard Frozen Foods. It used to be Ventura Farms Frozen Foods. They sold out.

Q. Did you ever work as a police officer or law enforcement officer?

A. No.

Mr. Danch:

Q. Mrs. Beesley, are you employed?

A. Yes.

Q. Where are you employed?

A. My husband and I have the Oxnard Beauty College.

Q. How long have you lived in Port Hueneme?

A. We have just moved to Oxnard. That doesn't give [fol. 99] the correct address, but we have lived in Port Hueneme over a year, previously in Ventura.

Mr. Danch: Do you want the juror's correct address?

The Clerk: Yes, I would like to have it.

The Prospective Juror: 1601 North "C", Oxnard.

The Clerk: Sixteen?

The Prospective Juror: 1601.
The Clerk: 1601 North "C".
The Prospective Juror: Oxnard.
The Clerk: Thank you.

Mr. Danch:

Q. Have either you or your husband ever been employed in police work?
A. I beg your pardon?
Q. Been employed in police work?
A. No.
Q. Law enforcement work of any kind?
A. No.

Mr. Danch: I should perhaps tell all the members of the jury that my name is John Danch, the attorney defending Mr. Baldonado, in case there is any doubt about it.

Q. Mrs. Beesley, you said you have no conscientious scruples or objections for the imposition of the death penalty. Do you have any feeling now that would prevent you from imposing life penalty in this case if the evidence appeared to make it warranted?
A. No.
[fol. 100] Q. You would listen to all of the evidence?
A. Yes.
Q. From both sides before you make up your mind?
A. Yes.
Q. Do you have any children, Mrs. Beesley?
A. Yes.
Q. What ages are they?
A. Seven, 5, 3 and 6 months.
Q. This trial very likely, possibly, will last three to five days. Do you think you can stay away that long from the children?
A. It's my vacation, but I don't like to.
Q. Mrs. Beesley, if after hearing all of the evidence you come to the conclusion that the correct sentence here is life imprisonment and you felt conscientiously that that was the decision that should be made, and after discussing with your fellow jurors, you still felt that way, would you maintain your decision and stay with it even though all the others were for some other decision?
A. Well, when I make up my mind, I usually leave it that way.

Q. And you wouldn't for expediency or other reasons give in just because the others wanted to, if you felt strongly and conscientiously that life imprisonment was the correct sentence?

A. I think I would vote as I felt.

[fol. 101] Mr. Daugh:

Q. Mr. Case, what is your occupation?

A. Engineer.

Q. Where are you employed?

A. Point Mugu.

Q. Have you ever served on a criminal trial before?

A. No.

Q. You, of course, I suppose have read about the case also?

A. Right.

Q. Have you formed an opinion as to what the penalty should be in this matter?

A. No.

Q. You will withhold your decision until you have heard all of the evidence, will you?

A. Right.

Q. Are you married?

A. No.

Q. Do you know Mr. Gustafson, the District Attorney?

A. No.

Q. Or any of his deputies?

A. No.

Q. Have you ever been employed in police work?

A. No.

Q. How long have you lived in Ventura County?

[fol. 102] A. Five years.

Q. Where did you reside prior to that time?

A. Santa Cruz.

Q. If you were so unfortunate, Mr. Case, to be in Baldonado's situation here, would you be willing to have the question of penalty heard by 12 jurors who were in the frame of mind that you are now in?

A. Yes.

Q. Bearing in mind all you have read and heard about the case?

A. Yes.

Q. Do you feel that the death penalty should be imposed here simply because Mrs. Duncan was sentenced to death?

A. No.

Q. You feel there might be mitigating factors that would warrant different punishment for co-defendants?

A. Yes.

Mr. Danch:

Q. Mr. Ely, is it?

A. Ely.

Q. Ely, I'm sorry.

You live in Moorpark?

A. Yes.

Q. How long have you lived there?

A. About two and a half years.

Q. Where did you live prior to that time?

[fol. 103] A. Los Angeles.

Q. What is your occupation?

A. I'm a lead man in the proper control section of Rocketdyne.

Q. I'm sorry. I didn't hear that.

A. I'm a lead man in the property control section at Rocketdyne.

Q. Are you married?

A. Yes.

Q. You have children?

A. Yes.

Q. What ages are they?

A. Six, 4 and 2.

Q. I presume you, too, have read a lot about Mrs. Duncan's case?

A. No, I haven't followed it too closely.

Q. You do know that she was sentenced to death, though?

A. Yes.

Q. Do you feel for that reason that Mr. Baldonado should be sentenced to death also?

A. No.

Q. Have you formed an opinion as to what the disposition of the case should be?

A. No.

Q. You will listen to all of the evidence that will be [fol. 104] brought in?

A. Yes.

Q. Before you make your decision?

A. Yes.

Q. Have you ever been employed as a law enforcement officer?

A. No.

Q. Any member of your family?

A. No.

Q. Mr. Ely, would you be willing to have your case heard, if you were in Mr. Baldonado's position here, by 12 persons who are now in the same frame of mind that you are now in?

A. I believe so.

Q. Do you know of any reason at all why you shouldn't serve as a juror in this matter?

A. No.

Q. You think you can be fair and impartial?

A. I believe so.

Mr. Danch:

Q. Mr. Parades, we went over your name so many times that I'm not sure how to pronounce it?

A. Parades.

Q. You live in Ojai?

A. Yes.

Q. What is your occupation?

A. Warehouseman at the Oxnard Air Force Base.

[fol. 105] Q. How long have you been so employed?

A. Two years.

Q. How long have you resided in Ojai?

A. Oh, a little over two years.

Q. Where did you live before that time?

A. Lived in Ventura and before that in Fillmore.

Q. Have you been following the newspaper accounts of this case?

A. Yes.

Q. Have you formed an opinion as to what the penalty should be?

A. Yes.

Q. Is that penalty death?

A. Yes.

Q. Do you feel that despite the fact that you have formed an opinion, you could listen to the evidence that will be presented here with an open mind?

A. Well, no. The way I feel there is no alternative for murder.

Q. Regardless of what is shown here you will vote for the death penalty?

A. Yes.

Mr. Danch: I challenge for cause, your Honor.

The Court: Challenge allowed. Call another name.

The Clerk: Mrs. Cleo Bashor, B-a-s-h-o-r.

(Prospective juror sworn.)

[fol. 106] The Court: It is Mrs. Bashor, is it?

The Prospective Juror: Bashor.

The Court: Bashor. Well, Mrs. Bashor, do you have any conscientious scruples against inflicting the death penalty in a murder case?

The Prospective Juror: No.

The Court: What?

The Prospective Juror: No.

The Court: All right, you may inquire.

Mr. Danch:

Q. Is there a Mr. Bashor?

A. No.

Q. Are you employed in any way, Mrs. Bashor?

A. What is it?

Q. Are you employed?

A. Well, I'm really retired. I do take care of children.

Q. Have you been following the progress of this case in the newspapers and over the radio?

A. Well, I have part of it, not all of it. I've been too busy.

Q. Have you formed any opinion about what Mr. Baldonado's penalty should be in this case?

A. Well, no, I haven't heard enough about it.

Q. You do know that Mrs. Duncan, the co-defendant, was sentenced to death?

A. Yes.

[fol. 107] Q. Do you feel because of that fact standing alone that Mr. Baldonado should similarly be sentenced?

A. No, not until I heard the verdict.

Q. You think there could be circumstances that might indicate a different penalty?

A. Yes.

Q. You will listen carefully to all the evidence?

A. Try to.

Q. With an open mind?

A. I would.

Q. Do you know any reason at all, Mrs. Bashor, why you couldn't be a fair and impartial juror on the question of penalty in this case?

A. No, I do not.

Q. Do you have children?

A. I have two.

Q. What ages are they?

A. Forty-one and 38.

Mr. Danch: Mr. Tyrrell, what is your occupation?

A. Instrument maker at Pt. Mugu.

Q. Pardon?

A. Instrument maker at Pt. Mugu.

Q. Are you married?

A. Yes.

Q. You have children?

A. Yes.

[fol. 108] Q. What are their ages?

A. I beg your pardon?

Q. What are their ages?

A. Nineteen and 16.

Q. Have you been following the progress of this case in the newspaper?

A. Not too much, no.

Q. You do know the outcome of Mrs. Duncan's case?

A. Yes.

Q. Have you formed an opinion as to what penalty should be imposed in this case?

A. No, I haven't.

Q. Will you listen to all the evidence in this case before you do form your opinion?

A. Of course.

Q. Do you feel that because Mrs. Duncan was given the death penalty that Mr. Baldonado must necessarily be given the death penalty?

A. No.

Q. Do you know any reason at all why you couldn't be a fair and impartial juror on that question?

A. No, I don't.

Q. Have you ever been employed as a law enforcement officer?

A. No.

Mr. Danch:

Q. Mr. Donlon, what is your occupation?

[fol. 109] A. Farmer.

Q. And I suppose you have read about the——

A. Yes.

Q. —Duncan murder case generally?

A. Yes.

Q. Have you formed an opinion as to what the penalty should be in this case?

A. Yes, I have, but I could be convinced, probably.

Q. You think there is some evidence that could be brought in that might change your mind on the question?

A. Possibly.

Q. Have you ever served on a criminal jury before?

A. No.

Q. Do you know Mr. Gustafson, the District Attorney?

A. I met the man about seven years ago.

Q. Do you feel that your acquaintanceship with him is such that it would influence you in this matter?

A. Pardon?

Q. Do you feel that your acquaintanceship with him would influence you in any manner whatsoever?

A. No.

Q. Mr. Donlon, if you were so unfortunate as to be sitting in Mr. Baldonado's position here, would you be willing to have the question of penalty be decided by 12 persons who are in the frame of mind you are now in?

A. I would be, yes.

[fol. 110] Q. You would be?

A. I believe I would be.

Mr. Danch:

Q. Mr. Houle?

A. Yes.

Q. What is your occupation?

A. Engineer for the State of California.

Q. Engineer?

A. Yes.

Q. How long have you been so employed?

A. Three years.

Q. You live in Ventura?

A. Yes.

Q. Do you know Mr. Gustafson, the District Attorney here?

A. No, sir.

Q. Or me?

A. I have seen you before.

Q. You don't know me personally, though?

A. No.

Q. What type of work do you do with the State of California?

A. Surveys.

Q. Have you read much about this case in the newspapers?

A. Yes.

Q. As a result of your reading and what you heard [fol. 111] have you formed an opinion as to what should be the penalty in this case?

A. No, sir.

Q. No?

A. No.

Q. Do you feel that because Mrs. Duncan was given the death penalty that Mr. Baldonado should necessarily be given the death penalty?

A. No, I don't.

Q. Do you think that if proper evidence were presented here, that you might be able to distinguish between the two as to the degree of penalty?

A. I do, sir.

Q. Are you married?

A. Yes, sir.

Q. Do you have children?
A. Yes, one, seven months.
Q. Seven?
A. Seven months.
Q. Seven months. Mr. Houle, after listening to all the evidence here and entering into the discussions with your fellow jurors after the case has been submitted to you, if you arrive at the determination that Mr. Baldonado should be sentenced to life imprisonment, that was your conscientious belief, would you hold to that belief?
A. Yes, sir.
[fol. 112] Q. Even though the others were opposed to you?
A. Yes.
Q. If you felt that was the correct decision?
A. Yes, sir.
Q. Before you do arrive at any decision, you will discuss the matter, as the Judge will instruct you fully and conscientiously with your fellow jurors?
A. Yes, sir.

Mr. Danch:

Q. Mr. Hubbell, what is your occupation?
A. I am district land man for the Texas Company.
Q. How long have you resided in Ventura County?
A. Approximately four years.
Q. Where did you live before that?
A. Los Angeles.
Q. Have you read about this case?
A. Yes.
Q. Did you follow Mrs. Duncan's case in the papers?
A. Not too closely.
Q. You do know what the result is, however?
A. Yes.
Q. Have you formed an opinion as to what penalty should be inflicted in this case?
A. No.
Q. You will listen to all of the evidence before you do form your opinion?
A. Yes.

[fol. 113] Q. Do you feel that because Mrs. Duncan was given the death penalty that Mr. Baldonado necessarily should be given the same penalty?

A. No.

Q. Have you ever served on a criminal jury before?

A. No, sir.

Q. Do you know Mr. Gustafson, the District Attorney?

A. No.

Q. Or any of his deputies?

A. No, I don't.

Q. Have you ever been engaged in law enforcement work of any type?

A. No.

Q. Do you know any reason at all, Mr. Hubbel, why you couldn't be a fair and impartial juror in this case?

A. None at all.

Mr. Danch:

Q. Mrs. Anderson, what is your occupation?

A. Clerk-typist at Port Hueneme Air Base.

Q. Have you followed Mrs. Duncan's case, read about it?

A. Just what I read in the newspapers.

Q. Have you discussed it with other persons?

A. Just, well, discussed with people off and on.

Q. Nobody purported to have any official knowledge [fol. 114] or anything like that about the case?

A. No.

Q. Have you formed an opinion as to what penalty should be imposed?

A. Yes, I have.

Q. Is that the death penalty?

A. Yes, sir.

Q. Do you feel that there could be any evidence brought in that would change your mind?

A. Could be.

Q. Do you feel that you would necessarily impose the death penalty because Mrs. Duncan has been given the death penalty?

A. Yes, I also think I would.

Q. You think, however, we might be able to change your mind?

A. Might.

Q. Could you put aside the opinion that you now have and listen to all of the evidence?

A. No, I don't believe I could, honestly.

Mr. Danch: Challenge for cause, your Honor.

The Court: All right, the challenge is allowed. You may be excused. Call another name.

The Clerk: Marcus H. McMillin.

(Prospective juror sworn.)

The Court: Mr. McMillin, do you have any conscientious [fol. 115] scruples against inflecting the death penalty in a murder case.

The Prospective Juror: I do not.

The Court: What?

The Prospective Juror: No.

The Court: All right, go ahead.

Mr. Gustafson: May we approach the bench, your Honor?

The Court: Yes.

(The following proceedings were had at the bench outside the hearing of the prospective jurors.)

Mr. Gustafson: I don't feel that a juror is challengeable for cause who thinks at this stage, for whatever reason, that either death or life imprisonment is the appropriate punishment.

The Court: That what?

Mr. Gustafson: That either the death penalty or life imprisonment is the appropriate punishment. There isn't any burden on anybody to produce any evidence whatever. I don't have to produce any and Mr. Danch doesn't have to produce any.

The Court: Wait a minute. It is time for a recess, anyway. You will come into my chambers.

We are about to take a brief recess, the usual morning recess, and you are excused for a few minutes until the Bailiff calls you.

(Recess.)

(The following proceedings were had in the Judge's [fol. 116] chambers:)

Mr. Gustafson: I wanted to say, your Honor, that I think that in this particular case, I know it's a very unusual situation, but it could be that I would put on no evidence and it could be that Mr. Danch would put on no evidence and it could be that a juror would consider that anybody who pleads guilty to murder in the first degree and did not put on any evidence at all should get the death penalty. I don't think a person would be automatically disqualified by reason of that.

The Court: What question precipitated this?

Mr. Gustafson: This last juror said that she thought the one that was excused—that she thought right now she would impose the death penalty.

The Court: She said she would impose it in any event.

Mr. Gustafson: I don't think she said she would in any event.

The Court: She sure did. That is the reason I excused her.

Mr. Gustafson: Then I misheard what she said.

The Court: You can get the Reporter to read it to you if you want to.

Mr. Gustafson: It isn't that important. The juror is excused.

The Court: She put it very plainly that she wouldn't change her mind no matter what the evidence in this case [fol. 117] is. That is the reason I excused her promptly.

Mr. Gustafson: Well, I have no objection to that, if that is what she said. I didn't understand her to say that.

The Court: Or something to that effect. It amounted to the same thing.

Mr. Danch: I think that was the substance of her answer, that nothing could change it.

Mr. Gustafson: If that is so, then I have nothing further to say, but I simply want to make the point that a juror or a prospective juror who thought that one or the other penalties was appropriate in the absence of any evidence wouldn't necessarily be legally disqualified because there might not be any evidence.

The Court: Nobody has asked her that question yet.

Mr. Gustafson: No.

The Court: You are just two jumps ahead of us.

Mr. Gustafson: Well, I thought that she was in that situation, but I must have misheard her then.

The Court: No, no, she wasn't in that situation.

Mr. Gustafson: All right, thank you, your Honor.

(The following proceedings were had in open court.)

The Court: All right, the prospective jury is all present. Go ahead.

Mr. Danch:

Q. Mr. McMillin, I have forgotten how far we had gotten in the questioning. What did you say your occupation was?

[fol. 118] A. I'm construction inspector for the Navy at Pt. Mugu.

Q. You now live in Camarillo?

A. Yes.

Q. Do you know Mr. Baldonado, the defendant in this case?

A. I know of him.

Q. From what you read in the paper or——

A. No.

Q. —around Camarillo?

A. His mother and his brother.

Q. You have read about the case, too, I presume?

A. Yes.

Q. Have you formed an opinion about the case from what you read?

A. No.

Q. Do you feel that you could listen to the evidence that would be presented here fairly and impartially?

A. I do, but I don't feel like I'm qualified by knowing his mother and brother as well as I do.

Q. You feel that might influence your decision; is that what you mean?

A. No, it wouldn't.

Q. Do you feel that you could render a fair and impartial decision even though you do know them?

A. I could if it was my own brother, yes.

[fol. 119] Q. Which brother worked under you?

A. Well, he's known as Jiggs. I don't remember his first name.

Q. Is there anything in the employment of his mother and brother that would prejudice you either for or against the defendant?

A. No.

The Court: What is the answer?

The Prospective Juror: No.

The Court: That's right, speak right up. The Court Reporter can't get the nod of your head.

Mr. Danch:

Q. You feel, Mr. McMillin, that even if your own brother were on trial, you could be a fair and impartial juror on the case?

A. I feel that way.

Q. Do you feel you would be willing to have your brother tried, if he were so unfortunate to be in this position, to have him tried by 12 jurors who feel the way you now feel?

A. I do.

Mr. Danch: Thank you very much.

Q. Mrs. Hanson, are you employed?

A. Well, I work for myself.

Q. What type of work do you do?

A. I'm a Registered Nurse.

Q. You say you work for yourself?

[fol. 120] A. Yes, sir.

Q. Have you followed the progress of this case through the newspapers from time to time?

A. Well, I have read some of the articles in the newspapers.

Q. Have you formed an opinion as to what the penalty should be in this case?

A. Well, no, I could have very easily, but I wouldn't let myself think that far ahead.

Q. You would listen to all of the evidence fairly and impartially before you made up your mind?

A. Yes, sir.

Q. Do you feel, Mrs. Hanson, that because Mrs. Duncan was sentenced to death that Mr. Baldonado should necessarily be sentenced to death also?

A. Well, I don't think so because I don't know anything about it, what he has done, other than just in the newspapers.

Q. You feel that listening to other evidence as to his background and that type of thing would help you make up your mind as to what the penalty should be?

A. To tell the truth, I couldn't repeat. I paid so little attention to his background that I couldn't even repeat it. I couldn't answer the question intelligently over what I have read.

Q. But you would like to have some of that evidence [fol. 121] to help you make up your mind; is that true?

A. Well, I would have to know about him; I mean I would have to hear it so I could make up my mind.

Q. Do you feel that you could be a fair and impartial juror in this case?

A. I think so.

Q. During the course of this trial there will be testimony by at least one psychiatrist. Is there anything in your background that would cause you to feel some prejudice either for or against a psychiatrist, as part of your training?

A. No, I think I would be able to understand better than the average, better than the average member of the laity merely because I have been so closely associated with the medical profession, and also I have worked in mental institutions several years. So if the man is mentally ill, I think I would be able to understand it. If he were not mentally ill, I think I could make that distinction with the psychiatrist's report.

The Court: You said something about mentally ill. What was that?

The Prospective Juror: I beg your pardon?

The Court: You said something about if the man was mentally ill, didn't you?

The Prospective Juror: No, I say if anyone were mentally ill, I have worked in a mental institution and if the man were——

[fol. 122] The Court: There is no question of whether this man is mentally ill or not. He has already withdrawn his plea of not guilty by reason of insanity and he is

presumed to be sane. Every person is presumed to be sane until he is proved to be insane.

The Prospective Juror: Well, I don't know anything about it.

The Court: The presumption in this case is that he is sane. You won't have to consider any question about sanity or insanity.

The Prospective Juror: I didn't know whether he was declared sane or not.

The Court: You have just one question. He has already plead guilty to murder in the first degree. There is only one question before this jury: Shall the death penalty be inflicted or shall he be given life imprisonment? That's all. That is the sole question before this jury.

The Prospective Juror: Well, your Honor, he asked me if a psychiatrist gave his report, would I be influenced, wasn't it? Or how was that?

Mr. Danch:

Q. I asked if there was anything in your background that would cause you to be prejudiced against a psychiatrist, either for or against a psyhciatrist?

A. For or against the psychiatrist. Well, what I meant was if the psychiatrist gave a report that the man had his reasons—or the psychiatrist gave a report that he was [fol. 123] sane, I would base my judgment on his decision.

Q. I understood you to answer that.

A. I mean I would thoroughly understand what the psychiatrist meant, at least.

Q. You feel, in fact, your training makes it easy for you to understand?

A. Than the average individual, I think so, yes, sir.

Mr. Danch: Thank you very much, Mrs. Hanson. We will pass for cause, your Honor.

Voir dire examination.

Mr. Gustafson:

Q. Mrs. Hanson, I was going to ask you some questions and the Judge asked you some right along the line I was going to ask, but just to make sure about this, you said

at this point you didn't know what Mr. Baldonado had done.

A. May I speak now?

Q. Yes.

A. I don't mean that. I meant—he asked me if I knew his background. I said I couldn't answer the question on his background now because I didn't pay enough attention. I didn't state that I didn't know what he has done. I do know that. I read that in the paper.

Q. As a matter of fact, he said right here in court this morning he pleaded guilty?

[fol. 124] A. Yes, sir.

Q. To murder in the first degree of Olga Duncan?

A. Yes, sir.

Q. So that we start this matter out with all of you people knowing that he has deliberately and wilfully and with premeditation murdered Olga Duncan. You do know that?

A. Yes. I thought he meant other things about his background.

Q. Oh. Well, now, you also understand, do you not, Mrs. Hanson, that the defendant is legally responsible for this murder. He must suffer a penalty, either life or death, I mean life imprisonment or death. There is no question about sanity here. He is sane.

A. Yes.

Q. You would accept that proposition to begin with?

A. Yes.

Q. When you start deliberating in the jury room if you should be selected as a juror to decide what the penalty should be; is that right?

A. That is true.

Mr. Gustafson: May I ask of all of you on this prospective jury whether any of you know Mr. Danch?

Any of you know his partner, Mr. Ferro?

I understand that no one personally knew the defendant, Mr. Augustine Baldonado?

[fol. 125] Prospective Juror McMillin: I only knew of him.

Mr. Gustafson: Yes, you, Mr. McMillin, knew of him through the employment of his mother and his brother at one time.

The Prospective Juror: Yes.

A prospective Juror: I know his wife and child.

Mr. Gustafson: You know his wife?

The Prospective Juror: Wife, child and mother-in-law through a patron at the school.

Mr. Gustafson: Through what?

The Prospective Juror: They are patrons of the school.

Mr. Gustafson:

Q. Mrs. Beesley, would that acquaintance of yours cause you to be more apt to learn in the direction of imposing the lesser of the two penalties on Mr. Baldonado because it might prove embarrassing otherwise to you if you voted the death penalty?

A. I don't think so. I think I would go by what was presented in court.

Q. And you could conscientiously, if you felt that this case merited the death penalty, vote it despite the fact that you are acquainted with some of his relatives or, that is, his wife?

A. Yes.

Mr. Gustafson: Would that be true of you, Mr. McMillin? That is, if you felt——

A. I stated that before.

[fol. 126] Q. Yes, I thought you did. I just wanted to make sure if you felt that this was the case, a proper case for the imposition of the death penalty, you wouldn't hesitate to do that or withdraw from doing it simply because you knew his mother or his brother?

A. I am not agreeing that I agree to the death penalty.

Q. No. I said if after you consider this case and had it submitted to you, if you then decided that this death penalty was appropriate, the mere fact that you knew his mother or his brother would not cause you to say, "Well, because of that I am not going to vote for the death penalty because I will be embarrassed to see them in the street or meet them", or something of that sort?

A. No.

The Court: Is the answer "No"?

The Prospective Juror: No.

Mr. Gustafson: Is there anybody else on the jury here

who might feel that by reason of any consequences that would flow from the imposition of the death penalty; that is, what your neighbors might say to you or your own family or friends or anybody else, that for that reason you would refuse to vote the death penalty even though you otherwise thought it the proper thing to do?

I take it from your silence then that nobody on this prospective jury panel will feel that way when it comes to [fol. 127] voting on the penalty.

Mr. Berg, this case is one which is rather peculiar in the law in that nobody has any burden to prove anything; that is, I don't have to prove that Mr. Baldonado, by any evidence presented here that Mr. Baldonado should get the death penalty and Mr. Danch doesn't have any burden of proving that he should get life imprisonment. The question of whether the penalty shall be death or life imprisonment is solely at your discretion. And it would be the same question that you would have to decide even if neither one of us presented one bit of evidence. Now, in the light of that, that there is no burden of proof and there is no necessity to put on any evidence by either one of us, do you have in your mind at the present time any opinion that in that situation, where you didn't hear anything or that I didn't prove something to you, that under those circumstances you would never vote the death penalty?

A. No.

Q. In other words, you are willing to accept the law that so far as penalty for this crime is concerned, the two penalties applicable, either death or life imprisonment, the law prefers neither one. It is up to you as to which you prefer and which you choose to inflict in the particular. You are willing to accept that as the law?

A. Yes.

Mr. Gustafson:

[fol. 128] Q. You, Mr. Case, wouldn't consider that despite what the law says, that unless you hear from me that such and such is so, you would never impose the death penalty? You don't have any such frame of mind, do you?

A. No.

Q. And you are willing, if you serve as a juror, to accept the law that the penalty is solely in your discretion?

A. Yes.

Mr. Gustafson: Is there anybody on this prospective jury panel who is of the frame of mind that unless I prove something to you, and I don't know what it would be, because, of course, as I said, the law doesn't require that I prove anything, anybody here on this prospective jury panel that unless I prove something on behalf of the People of the State of California you would never vote the death penalty?

I take it by your silence then that no one is of that frame of mind.

Now, Mr. Ely, I think you were one of those who was asked the question by Mr. Danch as to whether you would consider that you necessarily must impose the death penalty on Mr. Baldonado simply because Mrs. Duncan was given the death penalty, and you said that you would not necessarily do that by reason of that fact.

Let me ask you this: You would, would you not, if you in your own mind considered that it was a factor that bore some weight with you, you would not exclude as one of the [fol. 129] bases for determining the penalty the fact that Mrs. Duncan did receive the death penalty for this exact same crime?

A. No, I wouldn't exclude it.

Q. So that if you thought in your mind that one of the reasons for the death penalty is that for this very same crime Mrs. Duncan has received the death penalty, you would give weight to that?

A. Yes.

Mr. Gustafson: Is there anybody on this jury who would answer that question any differently than Mr. Ely did?

Prospective Juror McMillin: Mr. Prosecutor, I feel more or less out of place here on this thing on account of this acquaintance with the mother and the brother, which I have known for some time, and there's something within me that—I'd rather a lot be on some other jury than on this one.

Mr. Gustafson: Well, isn't this so then, Mr. McMillin, that really you are afraid that by reason of your acquaint-

ance with the mother and the brother you might even lean over backwards to be——

The Prospective Juror: No.

Mr. Gustafson: —extremely fair in this thing and you might actually go the other way?

The Prospective Juror: I'll put it another way. To me the death penalty is the easy way out and that's the way I feel about it. I think if a man is sentenced to life im-[fol. 130] prisonment at hard labor, he is paying a penalty and has time to think about the things that he has done in the past that has caused this, and to me, the death penalty, putting a man's life out like that, it's all over with, and I think the majority of our criminals in this country would prefer a death penalty than a life imprisonment at hard labor.

Mr. Gustafson:

Q. Well, Mr. McMillin, suppose we ask you this, though, with relation to this particular case you feel that your acquaintance with the mother and the brother might be such that it might influence your verdict on penalty?

A. Well, it has touched me already, as far as that is concerned. I'll agree to that.

Q. That is why I was asking you, Mr. McMillin, whether you did not believe, and it would be the perfectly natural thing for you to react to, if you didn't believe that this acquaintance would make it difficult for you to sit on the case and that it would, as a matter of fact, or might influence your verdict, just that very fact of your acquaintance?

A. I'll put it this way: It would make it difficult.

Q. You still think you could do it, though?

A. I could do it, but it's difficult.

Mr. Gustafson: Well, that, as of right now; is no legal excuse, so far as I know, Mr. McMillin, and any of these tasks are difficult.

How about you, Mr. Hubbell, talking about difficulty, [fol. 131] we all recognize that this is one of the most difficult, if not the most difficult, I think it is the most difficult task that any citizen is called on to perform as a juror: namely, determining whether a particular individual shall

die in the gas chamber for his crime. Will the difficulty of this preclude you, in and of itself, will that preclude you from voting for the death penalty?

A. No.

Mr. Gustafson: Let me ask each and every one of you whether on the basis that it is a very difficult task to do, whether that would preclude you from voting for the death penalty? Mr. Openshaw?

Prospective Juror Openshaw: No.

Mr. Gustafson: Mr. Berg?

Prospective Juror Berg: No.

Mr. Gustafson: Mrs. Beesley?

Prospective Juror Beesley: No.

Mr. Gustafson: Mr. Case?

Prospective Juror Case: No.

Mr. Gustafson: Mr. Ely?

Prospective Juror Ely: No.

Mr. Gustafson: Mrs. Beshor?

Prospective Juror Beshor: No.

Mr. Gustafson: Mr. Tyrrell?

Prospective Juror Tyrrell: No.

Mr. Gustafson: Mr. Donlon?

[fol. 132] Prospective Juror Donlon: No.

Mr. Gustafson: Mr. Houle?

Prospective Juror Houle: No.

Mr. Gustafson: Mr. McMillin?

Prospective Juror McMillin: Yes.

Mr. Gustafson: The fact that it is a difficult thing would preclude you from voting for the death penalty; is that it?

The Prospective Juror: Mr. Prosecutor, I stated my theory.

Mr. Gustafson: I understand that.

The Prospective Juror: That's the way I feel about it.

Mr. Gustafson: Well, if you answer to this question of mine, which was, because this a very difficult thing to do, would it keep you from voting for the death penalty?

The Prospective Juror: Yes.

Mr. Gustafson: You said "Yes," it would?

The Prospective Juror: Yes.

Mr. Gustafson: Then I challenge him for cause, your Honor.

The Court: Well, Mr. McMillin, you understand that the only question here is the matter of penalty, don't you?

The Prospective Juror: Yes, your Honor.

The Court: The question would be whether a jury inflict the death penalty or life imprisonment.

The Prospective Juror: Yes.

[fol. 133] The Court: That's all there is to it. You will listen to the evidence, won't you, that is adduced here?

The Prospective Juror: Yes.

The Court: On both sides, and if you think that the case is such a case that the death penalty should be inflicted, you would inflict it, wouldn't you?

The Prospective Juror: No.

The Court: Well, you are excused. Call another name.

The Clerk: Nelson Dean Smith.

(Prospective juror sworn.)

The Court: Mr. Smith, do you have any conscientious scruples against inflicting the death penalty in a murder case?

The Prospective Juror: No, sir.

The Court: What?

The Prospective Juror: No, sir.

The Court: Do you have some doubt about it?

The Prospective Juror: No, sir.

The Court: All right, you may inquire.

Mr. Danch:

Q. What is your occupation, Mr. Smith?

A. I'm a receiver at the Ojai Orange Association.

Q. How long have you lived on Ojai?

A. About two years.

Q. Married?

A. Yes, sir.

Q. Do you have children?

A. One.

[fol. 134] Q. What age?

A. Two years.

Q. Where did you live prior to your residence in Ojai?

A. Ventura.

Q. How long have you lived in Ventura County?

A. Twenty-seven years.

Q. Have you read anything about this case?

A. Some.

Q. Did you read about the prior trial, Mrs. Duncan's trial?

A. No, I didn't follow it.

Q. You do know, however, she was sentenced to death?

A. Yes, sir.

Q. Have you formed any opinion as to what the penalty should be in this case?

A. Yes, sir.

Q. And is it the death penalty?

A. Yes, sir.

Q. Do you feel that your opinion is so strong that nothing could be introduced here to change your mind?

A. No, sir.

Q. Would you listen to all of the evidence and set aside your opinion for the time being and listen to all of the evidence in trying to make up your mind here?

[fol. 135] A. I would.

Q. If you were in Mr. Baldonado's position here, would you want to have the question of penalty heard by 12 jurors who are in the frame of mind that you are now in?

A. Yes, sir.

Q. Do you think that you would be willing to trust to the fairness and impartiality of 12 persons who are in the same frame of mind you are now in?

A. Yes, sir.

Q. Have you ever served on a criminal trial before, Mr. Smith?

A. No, sir.

Q. How long have you been working in the type of work that you are now doing?

A. About two years.

Q. What did you do prior to that time?

A. Worked in a store.

Q. Have you ever been employed as a law enforcement officer?

A. Not as an employee, no.

Q. Pardon?

A. Not as an employee, no.

Q. Have you ever had any association with law enforcement in any way at all?

A. Yes.

Q. What?

[fol. 136] A. Well, I've got a brother that is a radio operator in the Sheriff's office. My mother, foster-mother is a matron in the Sheriff's office. I carry an auxiliary badge.

Q. Have you discussed this case with those relatives?

A. Not the extent of forming my opinion, no, sir.

Q. Have they told you anything about the character or background of the defendant, Mr. Baldonado?

A. No, sir.

Q. Your opinion is formed on what facts? Where did you learn the facts that you formed your opinion on?

A. Well, what I have read and his admission of guilt.

Q. You conscientiously feel that you could be a fair and impartial juror in this case?

A. I would try.

Q. You feel that you could?

A. All I could say is I would try. I couldn't tell you one way or the other until I hear it.

Q. You can't say positively that you would be a fair and impartial juror?

A. I would try.

Mr. Danch: I will challenge for cause, your Honor.

Mr. Gustafson: I submit there is no basis for a challenge for cause.

[fol. 137] The Court: It's pretty close to it.

Mr. Gustafson: Well, the juror didn't disclose anything in his answers.

The Court: He doesn't say that he would be fair and impartial. He says he would try to be. He doesn't say that he will be.

Mr. Gustafson: Well, maybe I misunderstood that. Let me ask you this, Mr. Smith: When you say you would try to be fair and impartial you mean, do you not, that your mind will be open to all the evidence and you will try to decide it on the basis of the evidence?

A. Yes.

Q. And your conclusions based thereon and on the basis of the crime to which the defendant has admitted that he committed, you will try to determine the appropriate penalty, life or death?

A. I would say there is only one penalty for him.

Q. In other words, did you incorrectly answer Mr. Danch's question when you said that you would listen to the evidence and be guided on the basis of that plus the crime to which the defendant has pleaded guilty in determining the penalty, did you incorrectly answer that when you meant to say that you would, in any event, vote the death penalty?

A. Yes.

Q. So that in any event you would vote the death penalty regardless of the consequences?

[fol. 138] A. Yes, sir.

Q. Regardless of the evidence presented to you?

A. Yes, sir, because that's his own admission.

Q. Pardon?

A. Of his own admission of guilt.

Q. Because he pleaded guilty to first degree murder?

A. Yes, sir.

Q. And it is your feeling that anybody who commits first degree murder should receive the death penalty?

A. Yes, sir.

Mr. Gustafson: Your Honor, I will submit that was the matter about which we talked in the chambers. I think that a juror in a case of this nature is not disqualified if he feels that on the basis of the crime alone this is the penalty that should be inflicted, because there is no guide for the jury here. The jury isn't bound by any particular rules. It is wholly in the jury's discretion.

The Court: In any event, if you sit on this jury, no matter what you hear here by way of evidence, you would vote to inflict the death penalty?

The Prospective Juror: Yes, sir.

The Court: You are excused. Call another name.

The Clerk: Lee L. Lizer, L-i-z-e-r. Is that Mrs. Lizer?

The Prospective Juror: Yes, sir.

[fol. 139] (Prospective juror sworn.)

The Court: Mrs. Lizer, is it?

The Prospective Juror: Yes.

The Court: Do you have any conscientious scruples against inflicting the death penalty in a murder case?

The Prospective Juror: Yes, I do.

The Court: You do. All right, you challenge for cause?
Mr. Gustafson: Yes, your Honor.
The Court: You are excused. Call another name.
The Clerk: Vernon B. Austin, A-u-s-t-i-n.

(Prospective juror sworn.)

The Court: Mr. Austin, do you have any conscientious scruples against inflicting the death penalty in a murder case?

The Prospective Juror: No, sir.

The Court: All right. Ladies and gentlemen, Court is about to adjourn until 2:00 o'clock this afternoon. You are excused until 2:00 o'clock this afternoon.

(Whereupon at 12:00 o'clock M., the Court adjourned proceedings until 2:00 o'clock P.M.)

[fol. 140] Ventura, California, April 6, 1959; 2:00 o'clock P.M.

The Court: All right, the prospective jurors are all present. Proceed.

Mr. Danch:

Q. What is your occupation, Mr. Austin?
A. Upholster.
Q. Upholsterer?
A. Yes.
Q. Here in Ventura?
A. Yes.
Q. Have you ever been employed in police work or law enforcement work of any type?
A. Never.
Q. Pardon?
A. No.
Q. Have you read about the trial of Mrs. Duncan?
A. I have.
Q. Did you read about the events before the trial, the arrests and——
A. Very little about them.
Q. Have you formed an opinion as to what penalty should be imposed here?
A. Yes, I have.

Q. Is that the death penalty?

[fol. 141] A. It is.

Q. Do you feel that you have so strong an opinion that you could not fairly and impartially listen to the evidence that is going to be presented here?

A. I don't believe I have.

The Court: You could listen to the evidence that may be adduced in this case and then predicate your verdict entirely on that evidence, couldn't you?

The Prospective Juror: I feel I could, sir.

The Court: Yes.

Mr. Danch:

Q. Do you feel that because Mrs. Duncan was sentenced to death that this defendant should also be sentenced to death?

A. I don't believe that the—it could be true. I don't think so.

Q. You truly and honestly feel that there could be a difference between the parties because of background and circumstances surrounding the crime and you could distinguish between them?

A. There may be a possibility.

Q. If the evidence so show?

A. There may be a possibility.

Q. You haven't closed your mind to any such possibility?

A. No, I haven't.

Q. If you were on trial here, Mr. Austin, in the defend-

[fol. 142] ant's place, would you be willing to have your case, the question of penalty heard by 12 jurors who are in the frame of mind that you are now in?

A. If I were in his seat, I don't know how I would feel, sir, but from where I am sitting I would say I think I would be an honest juror.

Q. As best you can project yourself, you feel you could be honest and impartial?

A. I believe so.

Q. To the best of your knowledge, you would be willing to have your case tried by 12——

A. As I say, I don't know how I would feel if I was in his place.

Q. Of course, none of us can place ourselves in that

position unless we were there, but to the best of your knowledge you feel that you could do that?

A. I guess so, yes.

Q. Do you know Mr. Gustafson, the District Attorney?

A. I know him as the District Attorney.

Q. No personal knowledge?

A. No.

Q. Other than the questions I have already asked you, do you know any reason whatsoever why you couldn't be a fair and impartial juror in this case?

A. No, sir.

[fol. 143] Mr. Danch: Pass for cause.

Mr. Gustafson:

Q. Mr. Austin, do you know Mr. Danch?

A. Not personally.

Q. Do you know Mr. Baldonado?

A. Not personally.

Q. Are you willing to accept, if you serve as a juror in this case, the fact that the defendant is conclusively presumed to be sane?

A. Yes.

Q. And legally responsible and answerable for the crime of first degree murder?

A. That's right.

Mr. Gustafson: Is there anybody on this panel right now who would not accept the Judge's instructions to you that you must conclusively presume that Mr. Baldonado is sane and was sane at the time that he committed first degree murder?

I take it from the silence that there is no one on this panel who would not accept that instruction by Judge Blackstock.

Let me ask you this, Mr. Hubbell, with respect to the penalty, do you have in your mind now any fixed and irrevocable or unchangeable opinion that the defendant should be sentenced to life imprisonment rather than death?

A. No.

Mr. Gustafson: Does anybody on this panel have any such idea in his mind at the present time; that is, that the

[fol. 144] penalty that should be fixed in this case against Mr. Baldonado should be life imprisonment and not death?

Once again I would like to ask each of you to consider the question first asked of you by Judge Blackstock, and I realize that this is repetitious but, on the other hand, I think you will understand the reason for asking it in the seriousness of this matter. That is this: Sometimes a juror, and we just saw it happen with Mr. McMillin here, will in the first instance say that he does not have any conscientious opinion regarding the death penalty which would keep him from voting the death penalty in this particular case, and yet after the prospective juror is sitting in that box and thinking about it for a while, the juror may have reservations and begin to think that it was not the proper thing to say in the first place, that he had no conscientious opinion, and since we are here trying this issue of penalty, because I am going to ask on behalf of the State of California that you do impose the death penalty, I ask each and everyone of you again to consider in your minds whether you do have any conscientious opinion about the death penalty which would keep you from voting for a verdict imposing the penalty of death for the crime of murder as committed by Mr. Baldonado?

I take it from the silence that nobody has changed his mind or decided that he has any reservations about this since he first answered the question in response to Judge Blackstock's remarks.

[fol. 145] Pass for cause.

The Court: All right, the peremptory is with the People.

Mr. Gustafson: I will excuse Mrs. Hanson.

The Court: Who?

Mr. Gustafson: Mrs. Hanson.

The Court: Mrs. Hanson, you are excused.

The Prospective Juror: I am excused?

The Court: You are excused, yes. Your check for mileage and per diem will be mailed to you. You are excused. Call another name.

The Clerk: Patrick J. Holden, H-o-l-d-e-n.

(Prospective juror sworn.)

The Court: Mr. Holden, where do you live?

The Prospective Juror: In Oxnard, sir.

The Court: Do you have any conscientious scruples against inflicting the death penalty in a murder case?

The Prospective Juror: No, your Honor.

The Court: You may inquire.

Mr. Danch:

Q. What is your occupation, Mr. Holden?

A. I'm a retail liquor dealer.

Q. Do you know Mr. Gustafson?

A. Yes, sir.

Q. Personally?

A. Well, I know him as an acquaintance.

Q. Do you see him socially frequently?

[fol. 146] A. Not frequently, but occasionally.

Q. You feel that your acquaintanceship with him would influence your decision in any way here?

A. No, sir.

Q. Are you a member of the Retail Liquor Dealers Association?

A. Yes, sir.

Q. Have you formed an opinion as to what the penalty should be in this case?

A. I have not.

Q. Have you read the newspapers about the Duncan case generally?

A. Yes, sir.

Q. And the arrest of the defendants and their subsequent indictment and trial?

A. Yes.

Q. Do you feel that because Mrs. Duncan has been sentenced to death that this defendant should also be sentenced to death?

A. No, sir.

Q. You conscientiously feel that there can be distinctions between co-defendants even though they are charged with the same crime?

A. Yes.

Q. Mr. Holden, I want you to consider this question very carefully. As Mr. Austin pointed out, it is very diffi-[fol. 147] cult to place yourself in a position like Mr. Baldonado's now. To the best of your ability, I wish you would do that and then tell me whether or not you would

like to have your trial heard, if you were in his position, by 12 persons who are in the frame of mind that you are now in?

A. Yes, sir.

Q. Do you think of any reason at all why you couldn't be a fair and impartial juror?

A. None, sir.

Mr. Danch: Pass for cause.

Mr. Gustafson: Mr. Holden, even though you wouldn't automatically oppose the death penalty simply because Mrs. Duncan got the death penalty, you wouldn't, on the other hand, automatically exclude that from your mind if you thought that that was a pertinent consideration in voting what penalty Mr. Baldonado should get, would you?

A. No, sir.

Q. And do you know Mr. Danch?

A. No, sir.

Q. Do you know Mr. Baldonado?

A. No, sir.

Q. Are you willing to accept the fact that the matter of the imposition of the penalty in this case is one which is solely in the discretion of the jurors and that I am not required to prove anything and neither is Mr. Danch?

A. Right, sir.

[fol. 148] Q. So that you are not then of the frame of mind that unless I prove something, you won't vote the death penalty? In other words, you are not going to say, "Well, I will not vote for the death penalty unless Mr. Gustafson proves such and such?"

A. Right.

Q. Are you willing to accept the law, if the Court so instructs you, that the purpose of this trial and for the purpose of inflicting a penalty upon Mr. Baldonado he is conclusively presumed to have been sane at the time he committed the murder of Olga Duncan?

A. Yes, sir.

Mr. Gustafson: Pass for cause.

The Court: All right, the peremptory is with the defendant.

Mr. Danch: We will excuse Mr. Donlon. You are excused, Mr. Donlon. Thank you very much.

The Court: Call another name.
The Clerk: Richard B. Lyttle, L-y-t-t-l-e.

(Prospective juror sworn.)

The Court: Where do you live, Mr. Lyttle?
The Prospective Juror: I live in Oxnard, Oxnard Beach.
The Court: Do you have any conscientious scruples against inflicting the death penalty in a murder case?
The Prospective Juror: No, I don't.
The Court: All right, you may inquire.

[fol. 149] Mr. Danch:

Q. You are a newspaper man?
A. That's right, Mr. Danch.
Q. Have you been covering the Duncan trial?
A. I handled some rewrites, not much direct reporting on it. I'm quite familiar with the case, however.
Q. Have you formed an opinion as to what the penalty in this case should be?
A. Not an unalterable one. Right now I know most of the facts, I believe, but I have an opinion.
Q. Is your opinion so fixed that no evidence could be adduced here to change your mind?
A. No, it is not that fixed.
Q. Would you conscientiously try to set aside your opinion, or would you conscientiously set aside your opinion and withhold forming your decision until you heard all of the evidence in this case?
A. Yes, I would.
Q. Do you know Mr. Gustafson, the District Attorney?
A. Yes, I do.
Q. Do you know him other than professionally?
A. No.
Q. Would your acquaintanceship with him affect your decision in any way?
A. I would try not to let it.
Q. You say it might?
A. Subconsciously.
[fol. 150] Q. For or against him?
A. Well, I respect him, but I don't always agree with him.
Q. Could you answer more explicitly?
A. Sometimes I find I violently disagree with him or

violently agree with him. I'm afraid my feelings would be quite strong in the case. I can't say how I would react to his argument in this case.

Q. Do you know me, other than the few minutes we spoke?

A. We have talked on the phone on previous occasions.

Q. The fact that you know me would affect your decision in any way?

A. I don't think it would.

Q. Do you feel you could be a fair and impartial juror in this case?

A. I would try my best.

Q. Is there any doubt in your mind?

A. Well, I think there would be some subconscious influences, but I would try to conscientiously——

Q. Do you feel that serving on this jury will unduly obstruct the performance of your work?

Mr. Gustafson: I object to that question as not a proper one to ask this juror.

Mr. Danch:

Q. Well, do you feel that the fact that this trial might [fol. 151] last five days might put you in an impatient mood and you might come to the decision more quickly than you might otherwise, just to get back to work?

A. It wouldn't put me in an impatient mood. It might my employer.

Mr. Danch: We will pass for cause.

Mr. Gustafson:

Q. Mr. Lyttle, you wouldn't require that I bear any burden of proof before you would return a penalty of death?

A. No.

Q. In other words, if the Judge tells you that the penalty to be imposed in this case is strictly and purely 100 percent in the discretion of the jury, and that neither side has to prove either that death is the proper penalty or life is the proper penalty, you would follow that instruction, would you not?

A. Yes, I would.

Q. With respect to the arguments of the attorneys, both

Mr. Danch's argument and my argument, whatever it might be, you would listen to it, would you not?

A. Yes.

Q. And you would realize, nevertheless, that that was not evidence in the case?

A. That's right.

Q. The only evidence would be the testimony from the witness stand of witnesses and documents that are intro-[fol. 152] duced in evidence; is that correct?

A. Yes.

Q. So that even if you violently disagree with an argument if it were made by me, let's say, as an attorney in this case, if you concluded, nevertheless, on the basis of the evidence and on your own feeling of what was the applicable penalty, if you concluded that the penalty that was proper in the case was death and it happened to be the same penalty that I was asking you to return, you wouldn't refuse to return it just because you didn't like the argument I made, would you?

A. No.

Q. You would accept the Court's instruction, would you not, Mr. Lyttle, that this defendant is conclusively presumed to have been sane at the time he wilfully and deliberately and with premeditation murdered Olga Duncan?

A. Yes.

Mr. Gustafson: Pass for cause.

The Court: The peremptory is now with the People.

Mr. Gustafson: I accept the jury as it now stands.

The Court: The peremptory is with the defendant.

Mr. Danch: We will excuse Mr. Holden. Thank you, Mr. Holden.

The Court: Call another name.

The Clerk: John C. Tobias, T-o-b-i-a-s.

(Prospective juror sworn.)

[fol. 153] The Court: Where do you live, Mr. Tobias?

The Prospective Juror: Saticoy.

The Court: How long have you lived in Ventura County?

The Prospective Juror: Almost all my life.

The Court: Do you have any conscientious scruples about inflicting the death penalty in a murder case?

The Prospective Juror: No, sir.
The Court: All right, you may inquire.

Mr. Danch:

Q. What is your occupation, Mr. Tobias?
A. Farmer.
Q. Do you know Mr. Gustafson?
A. Only as the District Attorney.
Q. Do you know him personally?
A. No, sir.
Q. Do you know any of his deputies?
A. No, sir.
Q. You have, I presume, read about this case during the——
A. Somewhat.
Q. —Mrs. Duncan's trial. Have you discussed it with any persons?
A. Not seriously.
Q. Have you discussed it with anybody who purported to have any personal knowledge of the case?
A. No, sir.
Q. Have you formed an opinion as to what the penalty [fol. 154] should be in this case?
A. No, sir.
Q. Do you feel that because Mrs. Duncan received a death penalty that this defendant should also be sentenced to death?
A. No, sir.
Q. Do you think that you can conscientiously say that you may be able to distinguish between co-defendants as to the degree of punishment that should be imposed upon them?
A. Yes, sir.
Q. Have you ever served on a criminal jury before, Mr. Tobias?
A. No, sir.
Q. Are you married?
A. Yes, sir.
Q. Children?
A. Three.
Q. What are their ages?
A. Sixteen, 13 and 11.

Q. Do you feel, Mr. Tobias, that you can fairly and impartially listen to the evidence in this case before you make up your mind as to what the penalty should be?

A. Yes, sir.

Q. If you were so unfortunate to be on trial here as Mr. Baldonado is, would you be willing to have your case heard by 12 jurors who have the frame of mind that you are [fol. 155] now in?

A. I believe so.

Mr. Danch: Pass for cause.

Mr. Gustafson:

Q. Mr. Tobias, even though, just because Mrs. Duncan got the death penalty doesn't mean that automatically you would vote the death penalty for Mr. Baldonado? Nevertheless, if you considered in your own mind that it was an appropriate thing to take into consideration; namely, that one person guilty of this murder got the death penalty, then you would consider that as a factor in determining what is the just and fair and equal punishment for this defendant, would you not?

A. Did you say would or wouldn't?

Q. You would take it into consideration if you thought it was a pertinent factor after you heard this case?

A. It would be a factor, yes, sir.

Q. All right. Now, you don't have any fixed opinion at the present moment that life imprisonment is the appropriate penalty, do you?

A. No, sir.

Q. You will follow the judge's instruction that the defendant, Mr. Baldonado, is conclusively presumed to have been legally sane and responsible criminally for his conduct of murdering Olga Duncan?

A. Yes, sir.

Q. You don't know Mr. Danch, do you?

[fol. 156] A. No, sir.

Q. You don't know Mr. Baldonado?

A. No, sir.

Q. And you also would follow the Court's instruction, would you not, Mr. Tobias, that the matter of penalty rests solely in your judgment and discretion and that I am not required to prove anything, nor is Mr. Danch?

A. That's right.

Q. Do you know any reason why you couldn't be fair and impartial to my client, the People of the State of California in this case?

A. No, sir.

Mr. Gustafson: Pass for cause.

The Court: Do you know of any reason why you couldn't be fair and impartial to both sides?

The Prospective Juror: No, sir, I do not.

The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted, your Honor.

The Court: The peremptory is now again with the defendant.

Mr. Danch: We will excuse Mr. Openshaw.

The Court: Call another name.

The Clerk: William F. Plymale, P-l-y-m-a-l-e.

(Prospective juror sworn.)

The Court: Mr. Plymale, do you have any conscientious [fol. 157] scruples against inflicting the death penalty in a murder case?

The Prospective Juror: No, I don't.

The Court: All right, you may proceed.

Mr. Danch:

Q. What is your occupation, Mr. Plymale?

A. I work as a psychiatric technician out at Camarillo State Hospital.

Q. Are you married?

A. Yes, sir.

Q. Do you have any children?

A. Yes, sir.

Q. How many?

A. One.

Q. What age?

A. Three.

Q. Have you been reading any of the newspapers about this case?

A. I read about the trial only. I didn't pay too much attention to the incidents before the trial.

Q. Do you know the outcome of the case, Mrs. Duncan's case?

A. Yes, I do.

Q. Have you formed any opinion as to what the penalty should be in this case?

A. No, sir, I haven't.

Q. Can you, Mr. Plymale, withhold your opinion until you have heard all the evidence in this case and discuss [fol. 158] it fully with your fellow jurors?

A. Yes, sir.

Q. Since you have not formed an opinion, I assume then that you do not feel that this defendant should necessarily receive the death sentence because Mrs. Duncan was so sentenced?

A. No, sir, I don't.

Q. Since you are a psychiatric technician, I presume that you will listen to the testimony of the pyschiatrists with a fair and open mind?

A. Yes, I will. I have.

Q. Is there anything in your work that would make you tend to disregard the testimony of psychiatrists?

A. No, sir.

Q. If you were on trial here as Mr. Baldonado is, would you be willing to have your case heard by 12 jurors who are in the frame of mind that you now are?

A. Yes, I would.

Q. Do you know Mr. Gustafson?

A. No, sir, I don't.

Q. Or any of his Deputies?

A. No, sir, I don't.

Q. Have you ever been employed in law enforcement work yourself?

A. No, I haven't.

Q. If the evidence here showed or convinced you that [fol. 159] Mr. Baldonado should be sentenced to prison for life and you were conscientiously convinced that was the proper penalty, would you stick with that decision?

A. If that were my conscientious opinion, I would stick with it, yes, sir.

Q. Even though all the other jurors were against you? If after all of your conversations and discussions, you

still were of that frame of mind, you would not abandon it for the purpose of, say, getting home early?

A. No, sir, I wouldn't.

Mr. Danch: Or for fatigue or any other reason? Pass for cause.

Mr. Gustafson:

Q. Mr. Plymale, since you are a psychiatric technician you do see people with mental disorders. I particularly want to ask you this question: whether you would follow the instruction of the Court that this defendant, Mr. Baldonado, is conclusively presumed to have been legally sane at the time he murdered Olga Duncan and that he is, therefore, fully and totally responsible to the criminal law for that crime even though he may have had or may now have some mental disorder?

A. Yes, I would follow the instruction of the Court.

Q. As a psychiatric technician I suppose that you do recognize that many persons have some mental disorders of some type who are not insane?

[fol. 160] A. Yes, that is quite true.

Q. And the law says, and it is applicable here, as the Judge will say, that a person who is sane is responsible for his acts and must suffer the penalty for them.

A. Yes.

Q. You don't know Mr. Danch, do you?

A. No, sir, I don't.

Q. Do you know his client, Mr. Baldonado?

A. No, sir.

Q. In this case are you willing to assume this heavy and great and grave responsibility of fixing a penalty, which might be either death or life imprisonment, under the law that the Judge will give you that the fixing of that penalty is absolutely in your discretion?

A. Yes, sir.

Q. And you won't then say, "Well, the District Attorney didn't prove certain things to me so, therefore, I am not going to vote for the death penalty?

A. No, sir.

Q. In other words, you would accept the fact that I don't have to prove anything to you?

A. Yes, sir.

Q. If the crime of which the defendant—the crime which the defendant committed and which he admitted committing and pleaded guilty to, if the circumstances of that crime and whatever evidence you hear concerning the defendant's [fol. 161] background indicate to you that the death penalty is the appropriate penalty, you wouldn't hesitate to vote for that verdict simply because of the consequences that may come to you for voting for it by reason of what your neighbors might say or your family or anybody else?

A. No, sir, I would vote my own.

Q. Regardless of any personal consequences?

A. Yes, sir.

Q. And you would vote your own convictions regardless of the consequences to the defendant? In other words, if you felt that the death penalty was appropriate and that that meant that if carried out, he would be executed in the gas chamber at San Quentin, bad as that might be, you would, nevertheless, vote for it? Is that correct?

A. Yes, sir.

Mr. Gustafson: Pass for cause.

The Court: All right, the peremptory is now with the People again.

Mr. Gustafson: I accept the jury as now constituted.

The Court: The peremptory is with the defendant.

Mr. Danch: Excuse Mr. Tobias. Thank you, Mr. [redacted].

The Court: Call another name.

The Clerk: William A. Kilgore, K-i-l-g-o-r-e.

(Prospective juror sworn.)

The Court: Mr. Kilgore, where do you live?

The Prospective Juror: Moorpark.

[fol. 162] The Court: How long have you lived in this County?

The Prospective Juror: Since 1942.

The Court: You have been here all morning, haven't you?

The Prospective Juror: Yes, sir.

The Court: And this afternoon. If you should be accepted as a juror in this case, could you be absolutely fair and impartial to both sides?

The Prospective Juror: I would, sir, yes.

The Court: Do you have any conscientious scruples against the death penalty in a murder case?

The Prospective Juror: No, sir.

The Court: All right, you may inquire.

Mr. Danch:

Q. What is your occupation, Mr. Kilgore?
A. I am a welder.
Q. How long have you lived in the County of Ventura?
A. About nine years.
Q. Where did you live before that time?
A. Los Angeles.
Q. How long did you live in Los Angeles?
A. Two years.
Q. Before that time?
A. Service.
Q. Are you married, Mr. Kilgore?
A. Yes, sir.
[fol. 163] Q. Do you have any children?
A. Yes, sir.
Q. How many?
A. Two.
Q. What are their ages?
A. Seventeen and 15.
Q. You say you were in the service?
A. Yes.
Q. What branch of the service?
A. Navy.
Q. How long were you in the Navy?
A. Three years.
Q. Have you read anything about this case?
A. Yes, sir.
Q. Did you read from day to day the trial of Mrs. Duncan?
A. Not completely.
Q. You did know, of course, that she was convicted and ultimately sentenced to death, though?
A. Yes.
Q. Have you formed any opinion about what the penalty should be in this case?
A. No, sir, I haven't.
Q. Have you given any thought to it at all?

A. Yes. Yes, I have given it some thought.

Q. Do you feel that you could fairly and impartially [fol. 164] try that question?

A. I think so.

Q. Have you ever been employed in police work or law enforcement work of any type?

A. No, sir, I haven't.

Q. Have you ever served on a criminal jury before?

A. No, sir, I haven't.

Q. Where were you born, Mr. Kilgore?

A. Texas.

Q. Do you know Mr. Gustafson, the District Attorney?

A. No, sir, only by his picture.

Q. Do you know any reason at all why you couldn't be a fair and impartial juror in this case?

A. Frankly, I don't.

Mr. Danch: Pass for cause.

Mr. Gustafson:

Q. Do you know Mr. Danch?

A. No, sir, I don't.

Q. Or Mr. Baldonado, his client?

A. No, sir, I don't.

Q. No reason why you couldn't be fair to my side of the case, the People of the State of California, is there?

A. I see no reason why not.

Mr. Gustafson: Pass for cause.

The Court: All right, the peremptory again is with the People.

Mr. Gustafson: I accept the jury as now constituted, [fol. 165] your Honor.

The Court: The peremptory is now with the defendant.

Mr. Danch: We will excuse Mr. Case. Thank you, Mr. Case.

The Court: Call another name.

The Clerk: Melvin H. Cornell, C-o-r-n-e-l-l.

(Prospective juror sworn.)

The Court: Mr. Cornell, if you should be accepted as a juror in this case, could you be absolutely fair and impartial to both sides?

The Prospective Juror: Yes, sir.

The Court: Do you have any conscientious scruples against inflicting the death penalty in a murder case?

The Prospective Juror: No, sir.

The Court: All right, you may inquire.

Mr. Danch:

Q. What is your occupation, Mr. Cornell?

A. Automobile salesman.

Q. You live in Ojai?

A. Yes, sir.

Q. How long have you lived there?

A. Three years.

Q. Are you a native of California?

A. Lacking a year, is all.

Q. Have you been reading about this case or the Duncan murder case generally in the newspapers?

A. Yes, sir.

[fol. 166] Q. Have you formed an opinion as to what the penalty should be in this case?

A. No, sir.

Q. Do you feel that because Mrs. Duncan was given the death penalty that this defendant should be given the death penalty also?

A. No, sir.

Q. Do you feel that it is possible for him to put on evidence here that might convince you that life imprisonment is appropriate?

A. Possibly.

Q. You have some doubt in your mind?

A. Yes, sir.

Q. In other words, you are pretty well convinced that the death penalty is the only one that should be given in this case?

A. I believe so, yes, sir.

Q. Would you say it is a true statement then that in your opinion the death penalty is the appropriate punishment and very probably no evidence at all could change your mind?

A. My mind could be changed, yes, sir.

Q. But you don't think it is very possible?

A. Yes, sir.

Q. Do you feel then that you could be a fair and impartial juror in this case?

[fol. 167] A. As to the evidence, yes, sir.

Q. You wouldn't want to be heard by 12 jurors in the frame of mind you are now in, though, would you, if you were on trial for your life?

A. I believe I would be, yes, sir.

Mr. Danch: Pass for cause, your Honor.

Mr. Gustafson:

Q. You will, Mr. Cornell, accept the fact and not raise any question about it that Mr. Baldonado is guilty of murder in the first degree if you serve as a juror?

A. Yes, sir.

Q. That he has pleaded guilty to that murder today here in court and you won't get in there and say, "Well, maybe he didn't commit it"?

A. Yes, sir.

Q. Do you know Mr. Danch?

A. No, sir.

Q. Do you know his client, Mr. Baldonado?

A. No, sir.

Mr. Gustafson: Pass for cause.

The Court: All right, the peremptory is again with the people.

Mr. Gustafson: I accept the jury as now constituted.

The Court: The peremptory is with the defendant.

Mr. Danch: We will excuse Mr. Cornell. Thank you, Mr. Cornell.

The Court: Call another name.

[fol. 168] The Clerk: King was excused, D. Gordon King.

The Court: He was excused.

The Clerk: His name was in the box.

The Court: Wasn't he excused by stipulation?

The Clerk: His name was already in the box. Marvin L. Stearns, S-t-e-a-r-n-s.

(Prospective juror sworn.)

The Court: Mr. Stearns, do you have any conscientious scruples against inflicting the death penalty in a murder case?

The Prospective Juror: No, sir.

The Court: You may inquire.

Mr. Danch:

Q. What is your occupation, Mr. Stearns?
A. I work for Ratheon Manufacturing Company.
Q. How long have you worked for them?
A. For approximately one year.
Q. What was your occupation before that time?
A. I was a meat cutter.
Q. Do you know Mr. Gustafson, the District Attorney?
A. No, I don't.
Q. Or any of his Deputies?
A. No, I don't.
Q. Have you read about this case?
A. Not very much, sir.
Q. Have you formed any opinion as to what the penalty should be in this case?
[fol. 169]. A. No, I haven't sir.
Q. Have you discussed the question of penalty with other persons?
A. I have talked with some people out at work.
Q. Did any of them purport to have any personal knowledge about this case?
A. No, sir.
Q. Other than what they read? Do you feel because Mrs. Duncan was sentenced to death that this defendant should necessarily be sentenced to death?
A. Not necessarily.
Q. Are you prepared to listen with an open and impartial mind to all the evidence in this case?
A. Yes, sir.
Q. Do you feel at this time that there is a possibility that your mind could be changed one way or the other?
A. Yes, sir.

Mr. Danch: Pass for cause, your Honor.

Mr. Gustafson:

Q. Mr. Stearns, this is a very grave responsibility that each one of the 12 jurors that finally hear this case will have.

A. I realize that, sir.

Q. Because it involves determining whether a man shall die. Considering the consequences of the verdict of death, would you, nevertheless, vote for that verdict if you were convinced that of the two penalties permissible in Cali- [fol. 170] fornia for this crime you felt the death penalty was the more appropriate of the two?

A. Then I would vote for the death penalty.

Q. Then you would vote for the death penalty regardless of the consequences to you, regardless of the fact that it is a very grave decision to make and regardless of the fact that that might be the end of the defendant's life; is that correct?

A. Yes.

Q. And you would not require, in order to vote for the death penalty, that I produce any particular kind of evidence or bear any burden of proving any particular thing, would you?

A. No, sir.

Q. You realize that from what the questions have been that have heretofore been asked that the determination of the penalty rests solely in your discretion and you will decide in your own mind what is the appropriate penalty from the nature of the crime committed, to which Mr. Baldonado has already pleaded guilty, and whatever circumstances the evidence may show in connection with that crime and whatever evidence may be brought out with respect to the defendant's background and history?

A. Yes, sir.

Mr. Gustafson: Pass for cause.

The Court: The peremptory is again with the People.

Mr. Gustafson: I accept the jury as now constituted, [fol. 171] your Honor.

The Court: The peremptory is with the defendant.

Mr. Danch: We will excuse Mr. Kilgore. Thank you, Mr. Kilgore.

The Court: Call another name.

The Clerk: Mrs. DeLois Greer, G-r-e-e-r.

(Prospective juror sworn.)

The Court: Mrs. Greer, do you have any conscientious

scruples against inflicting the death penalty in a murder case?

The Prospective Juror: No, not under the present legislation.

The Court: All right, you may inquire.

Mr. Danch:

Q. You live in Montalvo, Mrs. Greer?

A. Yes, I do.

Q. I didn't fully get the answer to the Judge's question. What did you say?

A. I said not under the present legislation do I oppose it.

Q. Are you employed, Mrs. Greer?

A. No.

Q. Have you ever been employed?

A. Yes, I am a previous school teacher.

Q. Is there a Mr. Greer?

A. Pardon?

Q. Is there a Mr. Greer?

[fol. 172] Yes.

Q. What is his occupation?

A. He is a food clerk.

Q. Has your husband ever been employed in law enforcement work?

A. No.

Q. Do you have any children?

A. Yes, I do.

Q. Have you been reading the newspapers about this case, Mrs. Greer?

A. Somewhat.

Q. Have you formed an opinion as to what the penalty should be in this case?

A. No, sir

Q. Your mind is completely open on that subject?

A. Yes, it is.

Q. You know, of course, Mrs. Duncan was sentenced to death?

A. Yes.

Q. Do you feel that because she was that this defendant should also be sentenced to death?

A. Not at all.

Q. You will fairly and impartially listen to the evidence and then render your decision solely on this case alone?

A. Yes, sir, I will.

[fol. 173] Have you ever served on a criminal jury before?

A. No, I haven't.

Q. How long have you lived in Ventura County, Mrs. Greer?

A. Three years in September.

Q. Where did you live prior to that time?

A. Tulare County.

Q. How long have you lived in California?

A. I'm a native daughter.

Q. Do you know Mr. Gustafson, the District Attorney?

A. No, I do not.

Q. Do you know any reason at all why you would not be a fair and impartial juror in this case?

A. No.

Mr. Danch: Pass for cause.

Mr. Gustafson:

Q. Mrs. Greer, do you have any fixed idea in your mind that of the two applicable penalties the life imprisonment is the preferable one?

A. Not necessarily.

Q. In other words, you will accept the law that they are equally applicable penalties and that the matter of which of the two shall be imposed is solely in the discretion of the jury?

A. That's right.

Q. And you do not entertain such conscientious opinions concerning the death penalty that would cause you [fol. 174] not to vote for the death penalty?

A. No.

Q. So that if in the light of what is presented to you in the facts of this case you believed that the death penalty is the more appropriate of the two possible penalties in this case, you would then vote that way even though it is a very serious and grave decision?

A. Yes.

Q. You wouldn't hesitate or fail to vote that way because you would be worried in your own mind about what

you might have done and might lose sleep about it, and so forth? You wouldn't let that sort of thought keep you from voting for the death penalty, would you?

A. No, I am very conscientious about the thing. I would consider it, of course. I wouldn't let it involve my opinion.

Q. Realizing, of course, Mrs. Greer, that no matter who determines the penalty in any case, whether it's the judge or the jury, particularly in a capital case because it is a grave decision and each of us may have reservations and thoughts of that kind?

A. Absolutely.

Q. I take it then from your answer that if you feel that the death penalty is appropriate, you wouldn't shirk your duty in imposing it?

A. No.

[fol. 175] Q. Do you know Mr. Danch?

A. No.

Q. I take it you don't know his client, Mr. Baldonado?

A. No, I don't.

Q. You would accept the fact, would you not, Mrs. Greer, that I don't have any burden of proving anything to you as to why the death penalty should be applied?

A. Yes, that is already understood.

Q. You understand that?

A. Yes.

Q. Nor does Mr. Danch have to prove to you why life imprisonment should be applied in this case.

A. That's right.

Q. After you hear what the crime was and whatever evidence is presented by either of us, realizing that neither one has to present any evidence, and if we do present some, after hearing that, that the penalty is solely in your discretion? You will follow that?

A. Yes.

Mr. Gustafson: Pass for cause.

The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury as it is now constituted.

The Court: The peremptory is now with the defendant.

Mr. Danch: We will excuse Mr. Ely. Thank you, Mr.

[fol. 175a] Ely.

The Court: Call another name.

The Clerk: Dorothy N. Slocum, S-l-o-c-u-m.

(Prospective juror sworn.)

The Court: Mrs. Slocum, where do you live?

The Prospective Juror: Ventura.

The Court: What?

The Prospective Juror: In Ventura. .

The Court: How long have you lived in this County?

The Prospective Juror: Twenty years.

The Court: Did you ever serve on a jury of any kind?

The Prospective Juror: Yes.

The Court: A criminal case?

The Prospective Juror: No, sir.

The Court: If you should serve on this jury, could you be absolutely fair and impartial to both sides?

The Prospective Juror: I believe I could.

The Court: Do you have any conscientious scruples against inflicting the death penalty in a murder case?

The Prospective Juror: Yes, I do.

Mr. Gustafson: Challenge for cause.

The Court: You are excused. Call another name.

The Clerk: Helen L. Hodson, H-o-d-s-o-n. Is it Mrs.?

The Prospective Juror: Mrs.

(Prospective juror sworn.)

The Court: Mrs. Hodson, do you have any conscientious [fol. 175b] scruples against inflicting the death penalty in a murder case?

The Prospective Juror: I'm sorry. I can't hear you.

The Court: Are you hard of hearing?

The Prospective Juror: Well, just recently.

The Court: What?

The Prospective Juror: Yes, I have had a great deal of trouble just recently.

The Court: Do you want to stipulate?

Mr. Gustafson: I will so stipulate, your Honor.

Mr. Danch: So stipulated.

The Court: You are excused. Call another name. Be careful now. We don't want any laughing in the courtroom. We want no demonstration of any kind.

The Clerk: Richard S. Buchanan, B-u-c-h-a-n-a-n.

(Prospective juror sworn.)

The Court: Where do you live, Mr. Buchanan?
The Prospectiye Juror: Ventura.
The Court: How long have you lived in this County?
The Prospective Juror: About 13 years.
The Court: Have you ever served on a jury?
The Prospective Juror: No.
The Court: You have been here all day, have you not?
The Prospective Juror: Yes.
The Court: You know generally what the case is all about?
The Prospective Juror: Yes.
[fol. 175c] The Court: Do you have any conscientious scruples against inflicting the death penalty in a murder case?
The Prospective Juror: No.
The Court: You may inquire.

Mr. Danch:

Q. What is your occupation, Mr. Buchanan?
A. I'm in the general insurance business.
Q. Here in Ventura?
A. Yes.
Q. Are you married?
A. Yes.
Q. Do you have any children?
A. Two.
Q. What are their ages?
A. Two years and one two months.
Q. Have you ever been employed as a police officer, Mr. Buchanan?
A. No.
Q. Or involved in law enforcement work generally?
A. No.
Q. Did you serve in the Armed Forces?
A. Yes, sir.
Q. Were you with the Military Police in any form there?
A. No.
Q. Have you been reading the papers about this case?
[fol. 175d] A. Yes.
Q. Have you formed an opinion as to what the penalty should be in this case?
A. In this case, no.

Q. Have you discussed the question of penalty with other people?

A. No.

Q. You haven't ventured any opinion to people on the street as to what you think should be done in this case?

A. No.

Q. Do you know Mr. Gustafson, the District Attorney?

A. No, I don't.

Q. Or any of his Deputies?

A. No.

Q. Have you discussed the case with people generally?

A. Somewhat.

Q. Have you discussed it with any person who purported to have some personal knowledge of the case?

A. No.

Q. No police officers or investigators or anyone like that?

A. No.

Q. Now, if you were on trial for your life here as Mr. Baldonado is, would you be willing to have your case [fol. 175e] heard by 12 jurors who were in the frame of mind that you are now in?

A. Yes.

Q. Do you feel because Mrs. Duncan was sentenced to death that this defendant should necessarily be sentenced to death also?

A. No.

Mr. Danch: Pass for cause.

Mr. Gustafson:

Q. Do you know Mr. Danch, Mr. Buchanan?

A. I have met him.

Q. How extensive is your acquaintance with him?

A. Just an introduction is all.

Q. One time?

A. Yes.

Q. You haven't been a client of his, have you?

A. No.

Q. Was this a social introduction?

A. Social introduction.

Q. Do you know Mr. Cole, the adjuster, investigator?

A. Yes, I do.

Q. Would you acquaintance with him be such that you would be biased in favor of a side where he had done work?

A. No.

Q. Are you willing to accept the fact that in a case of this kind the penalties which are applicable; namely, two in number, death or life imprisonment, that the infliction [fol. 175f] of the penalty is solely in the discretion of the jury?

A. Yes.

Q. Do you have in your mind right now, Mr. Buchanan, any notion that the life imprisonment penalty is ordinarily the preferable one to impose?

A. Yes. By preferable you meant easier?

Q. No, I meant the one that would ordinarily be the one which, if you were sitting as a juror, you should impose.

A. No.

Q. Realizing that, of course, it is easier to impose the life imprisonment sentence, would you, nevertheless, stand up to your duty and vote the death penalty if on the basis of the evidence you heard and the facts presented here you thought that the appropriate penalty in this case was the death penalty?

A. Yes, I would.

Q. You would do that even though you realized that it would be much easier to vote for life imprisonment?

A. Yes.

Q. You would do that even though that might cause you to worry about whether you did the right thing and cause you some sleepless nights, maybe even some remarks from friends or neighbors or something like that, if you, yourself, thought that was the appropriate penalty, you would vote it regardless of the consequences to you? [fol. 175g] A. Yes.

Q. My client in this case, Mr. Buchanan, is the People of the State of California. There is nobody sitting here to represent my client as Mr. Danch has there, Mr. Baldonado, a live person as his client. Could you in the light of that situation, nevertheless, give to my client, the People of the State of California, just as *fair* and impartial a trial in this matter of penalty as you would give to Mr. Danch's client?

A. Yes.

Q. Would you accept the Judge's instruction that in this case Mr. Baldonado is presumed to have been legally sane and fully and totally responsible for the crime of murder that he committed in November of 1958?

A. Yes, I would.

Q. You wouldn't require that I prove any particular thing before you would, as a condition precedent to voting the death penalty, would you?

A. No.

Mr. Gustafson: Pass for cause.

The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted, your Honor.

The Court: The peremptory is with the defendant.

Mr. Danch: We will excuse Mr. Austin. Thank you, Mr. Austin.

[fol. 175h] The Court: Call another name.

The Clerk: He was excused by stipulation, Mr. McCorkle, Marvin E.

The Court: All right, call another one.

The Clerk: Mark H. Oppenheim, O-p-p-e-n-h-e-i-m.

(Prospective juror sworn.)

The Court: Mr. Oppenheim, do you have any conscientious scruples against inflicting the death penalty in a murder case?

The Prospective Juror: Yes, sir, I do.

The Court: What?

The Prospective Juror: Yes, sir.

Mr. Gustafson: Challenge for cause.

The Court: All right, you are excused. Call another name.

The Clerk: Walter T. McKinny, M-c-K-i-n-n-y.

(Prospective juror sworn.)

The Court: Where do you live, Mr. McKinny?

The Prospective Juror: Oxnard.

The Court: How long have you lived in this County?

The Prospective Juror: All my life.

The Court: Did you ever sit on a jury?

The Prospective Juror: No, sir.

The Court: Do you have any conscientious scruples against imposing or inflicting the death penalty in a murder case?

[fol. 175i] The Prospective Juror: No, sir.

The Court: You may inquire.

Mr. Danch:

Q. What is your occupation, Mr. McKinny?

A. Salesman for Power Tractor Company.

Q. For whom?

A. Power Tractor Company in Oxnard.

Q. Do you know Mr. Gusfafson, the District Attorney?

A. No, sir.

Q. Or any of his Deputies?

A. No, sir.

Q. You, I presume, have been reading the newspapers about the progress of this case?

A. Vaguely.

Q. Have you formed any opinion as to what the penalty should be?

A. No, sir.

Q. Have you discussed the question of penalty with other persons?

A. No, sir.

Q. Do you have an opinion at this time what the penalty in this case should be?

A. No, sir.

Q. Do you feel because Mrs. Duncan was given the death penalty that this defendant should be sentenced to death also?

A. No, sir.

[fol. 175j] Q. Do you know any reason at all why you couldn't be a fair and impartial juror in this case?

A. No, sir.

Mr. Danch: We pass for cause, your Honor.

Mr. Gustafson:

Q. Do you know Mr. Danch?

A. No, sir.

Q. Or his client, Mr. Baldonado?

A. No, sir.

Q. You know of no reason why you couldn't give my client, the People of the State of California, a fair trial in this matter?

A. That's right.

Q. And you would accept the fact that the defendant here is guilty of murder in the first degree?

A. Right.

Q. And that he was sane at the time he committed the murder?

A. Right.

Q. And that the only question for you to determine is which of the two penalties is more appropriate and which one should be applied in this case?

A. Right.

Mr. Gustafson: Pass for cause.

The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted.

The Court: The peremptory is with the defendant.

[fol. 175k] Mr. Danch: We excuse Mr. Buchanan. Thank you, Mr. Buchanan.

The Prospective Juror: Thank you.

Mr. Danch: I am sorry, Mr. McKinny.

The Court: Call another name.

The Clerk: Fred A. Ellicock, E-l-l-i-c-o-c-k.

(Prospective juror sworn.)

The Court: Where do you live, Mr. Ellicock?

The Prospective Juror: Ojai.

The Court: Ojai. How long have you lived in this County?

The Prospective Juror: Seven years.

The Court: Have you ever served on a jury?

The Prospective Juror: Never have.

The Court: Of course, you have been here all day and you know what this case is all about?

The Prospective Juror: Yes.

The Court: Is that right?

The Prospective Juror: That's right.

The Court: You know this is a murder case and that the defendant has plead guilty to murder in the first degree?

The Prospective Juror: Yes.

The Court: And the jury are here to determine what

penalty should be inflicted, the death penalty or life imprisonment. You understand that?

The Prospective Juror: I understand that.

[fol. 175l] The Court: Do you have any conscientious scruples against inflicting or imposing the death penalty in a murder case?

The Prospective Juror: No, sir.

The Court: You understand that you won't be permitted to consider, or to think anything about the question of sanity or insanity because the defendant is conclusively presumed to be sane here, so far as you are concerned; you understand that?

The Prospective Juror: I understand that.

The Court: Do you know of any reason at all why you shouldn't sit on this jury?

The Prospective Juror: No.

The Court: You may inquire.

Mr. Danch:

Q. What is your occupation, Mr. Ellicock?

A. I work on a survey party for Richfield Oil.

Q. Have you ever been employed in law enforcement work?

A. No.

Q. Are you married?

A. Yes.

Q. Do you have any children?

A. No.

Q. Do you know the District Attorney, Mr. Gustafson?

A. No, I don't.

[fol. 175m] Q. Have you formed an opinion as to what the penalty should be in this case?

A. Just from the little I have read, I have.

(Answer read.)

Mr. Danch:

Q. Do you think you could set aside that opinion and consider this case solely on the evidence shown here in court?

A. Yes.

Q. And then discuss it with the jurors, the fellow jurors?

A. Yes.

The Court: Notwithstanding any opinion that you may have, would you predicate any verdict that you might arrive at entirely upon the evidence that will be adduced here in this case?

The Prospective Juror: Could I? Yes.

The Court: Could you disregard any opinion that you may have at the present time?

The Prospective Juror: Yes, I believe I could.

The Court: And predicate your verdict upon the evidence in this case?

The Prospective Juror: Yes, I believe I could.

The Court: You could?

The Prospective Juror: Yes.

Mr. Danch:

Q. Do you think that there is some evidence that possibly could change your mind or do you feel that your [fol.175n] mind is fairly well fixed that the defendant should be——

A. No, I don't think it is completely fixed beyond the—I haven't read too much about the case.

Q. If you can imagine yourself being in Mr. Baldonado's situation here, would you be willing to have your case heard by 12 persons who are in the frame of mind you are now in?

A. Yes, I believe I would.

Mr. Danch: Pass for cause.

Mr. Gustafson: Pass for cause.

The Court: You understand that this defendant has plead guilty; don't you?

The Prospective Juror: Yes, I do.

The Court: But you are here only to determine the penalty?

The Prospective Juror: I understand that.

The Court: All right, the peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted.

Mr. Danch: Mr. McKinny, we will excuse you this time.

The Prospective Juror: Thank you, sir.

Mr. Danch: We will excuse Mr. McKinny.
The Court: Call another name.
The Clerk: Donald C. Lind, L-i-n-d.

(Prospective juror sworn.)

[fol. 175o] The Court: Where do you live, Mr. Lind?
The Prospective Juror: In Oxnard.
The Court: How long have you lived in this County?
The Prospective Juror: Almost five years.
The Court: What?
The Prospective Juror: Almost five years.
The Court: Did you ever serve on a jury?
The Prospective Juror: No sir.
The Court: You have been here all day, have you not?
The Prospective Juror: Yes, sir.
The Court: You know generally what this case is all about?
The Prospective Juror: Yes, sir.
The Court: You know it is a murder case and that the defendant has plead guilty to murder in the first degree?
The Prospective Juror: Yes, sir.
The Court: The only question left here is to determine what the penalty shall be, death or life imprisonment.
The Prospective Juror: Yes.
The Court: Do you have any conscientious scruples against imposing or inflicting the death penalty in a murder case?
The Prospective Juror: None whatsoever.
The Court: You may inquire.

Mr. Danch:

Q. What is your occupation, Mr. Lind?
A. I'm an engineer at the Pacific Missile Range.
[fol. 175p] Q. Are you married?
A. Yes, sir.
Q. Do you have any children?
A. Yes.
Q. What ages are they?
A. Six, 5, 3 and 2.
Q. How long have you lived in Ventura County?
A. Almost five years.
Q. Where did you live prior to that time?

A. In Norfolk.

Q. Have you formed an opinion in this case as to what the penalty should be?

A. Yes, I have.

Q. Do you feel that your opinion is fixed or do you think it can be subject to change?

A. Well, I think it's definite. I don't see any way I could change my mind.

Mr. Danch: We will challenge for cause, your Honor.

The Court: Challenge allowed. Call another name.

The Clerk: Jessie F. Warren, W-a-r-r-e-n.

(Prospective juror sworn.)

The Court: Where do you live, Mrs. Warren?

The Prospective Juror: Ventura.

The Court: Do you have any conscientious scruples against inflicting or imposing the death penalty in a murder case?

[fol. 175q] The Prospective Juror: No, I don't.

The Court: You may inquire.

Mr. Danch:

Q. Is there a Mr. Warren?

A. Yes.

Q. How is he employed?

A. Oil field.

Q. Are you employed, Mrs. Warren?

A. Yes.

Q. What is your occupation?

A. I'm a grocery clerk.

Q. Do you have any children?

A. Not at home.

Q. All grown?

A. They are all married.

Q. How many children do you have?

A. I have two, two stepsons.

Q. I presume, Mrs. Warren, like almost everybody you have ready about this case?

A. Yes, some.

Q. Have you formed an opinion as to what the penalty should be?

A. No, I haven't been able to.

Q. Have you discussed the matter with other people?

A. Well, not seriously.

Q. Did any of the people that you discussed the case with purport to have any personal knowledge of the case? [fol. 175r] A. No.

Q. Do you feel that because Mrs. Duncan was sentenced to death that this defendant should necessarily be sentenced to death also?

A. No, not especially.

Q. Do you feel that you could conscientiously weigh and consider all of the evidence before you make up your mind?

A. That's right.

Q. Now, if your son—do you have a son?

A. Yes, I have a son.

Q. If your son were on trial for his life, as Mr. Baldonado is here, would you be willing to have the case heard by 12 persons who are in the frame of mind you are now in?

A. Yes, I think so.

Q. Do you know Mr. Gustafson, the District Attorney?

A. No.

Q. Have either you or your husband ever been employed in law enforcement work?

A. No.

Q. Do you know any reason at all why you couldn't be a fair and impartial juror in this case?

A. No, I don't.

Mr. Danch: Pass for cause.

Mr. Gustafson:

Q. Mrs. Warren, you said, I think—I don't know if I quite got your answer—that you hadn't been able to form [fol. 175s] any opinion. What do you mean by that?

A. Well, I have been thinking over the case in my mind, but I would have to hear more about it to decide anything. I haven't paid enough attention to any of it.

Q. I see. Well, now, you realize, Mrs. Warren, that there is going to be nothing to think over in your mind or anybody else's mind with respect to whether this man wilfully and deliberately and with premeditation killed Olga Duncan, murdered her.

A. I understand that.

Q. You will accept that, won't you?
A. I will accept it.
Q. You won't have to have any proof about that?
A. No.
Q. Or anything further?
A. No.
Q. Than what you have heard right now?
A. That's right.
Q. Because he is guilty of first degree murder, and you won't have to have anything further than what you know right now that he is conclusively presumed to have been sane and legally responsible for what he did?
A. Yes.
Q. Back in November of 1958. And you wouldn't have any difficulty making up your mind on that; in fact, it is all made up. He is guilty and he has got to be punished. [fol. 175t] The only thing that is here for you to decide is what his punishment shall be, death or life imprisonment. Now, with respect to this penalty, sometimes, and particularly for a woman, it becomes very difficult, because of all of the emotions involved, to vote for a verdict which the woman knows will result in a man being put to death in the gas chamber. I want you to consider seriously the implications of that and tell me quite frankly whether you are capable of voting for such a verdict if you think that it is the appropriate penalty between the two penalties that are involved?
A. I believe so.
Q. Do you have any doubt about it?
A. No.
Q. In other words, if you thought that the death penalty is the appropriate penalty in this case, then you not only could, but you would vote that that penalty be inflicted; is that correct?
A. That's right.
Q. You wouldn't let the fact alter your decision, the fact that I happen to be representing a client called the People of the State of California and who isn't represented by a person sitting here, whereas Mr. Danch has Mr. Baldonado there as his client? This wouldn't so influence you that you would forget about my client just because there's nobody sitting here next to me?

A. No.

[fol. 175u] Q. You would give my client, the People of the State of California, every consideration the same as you would Mr. Danch's client; is that correct?

A. That's right.

Q. Now, you said that you haven't heard anything about the case and you haven't been able to form an opinion. Would you accept the fact, Mrs. Warren, that I'm not required at all to prove anything to you as far as penalty is concerned?

A. Yes.

Q. In other words, this is quite different from the ordinary trial where somebody has to prove something. Here the question of penalty is solely in your discretion as a juror.

A. That's right.

Q. And so even if I didn't put any evidence in at all, you might properly consider that the death penalty should be imposed in this case merely and only on the basis that the defendant has admitted in court here that he did commit murder in the first degree? That alone might be sufficient?

A. Might be, yes.

Q. Pardon?

A. Yes.

Q. You would be willing to accept that state of the law?

A. Yes.

Q. Then, of course, similarly, Mr. Danch doesn't have [fol. 175v] to prove to you that life imprisonment is the proper penalty. Neither one of us has to prove anything and neither one of us has to introduce any evidence.

A. That's right.

Q. On that basis could you and would you do your best to decide between the two penalties which is the proper one, based on whatever you may hear, whether it is very little or very much?

A. Yes, sir.

Mr. Gustafson: Pass for cause.

The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted.

The Court: The peremptory is with the defendant.

Mr. Danch: We will excuse Mr. Ellicock.

The Court: Draw another name.
The Clerk: Emil M. Pfeiler, P-f-e-i-l-e-r.

(Prospective juror sworn.)

The Court: Mr. Pfeiler, do you have any conscientious scruples against inflicting the death penalty in a murder case?

The Prospective Juror: No, sir.

The Court: You may inquire.

Mr. Danch:

Q. What is your occupation, Mr. Pfeiler?

A. I'm a farmer, sir.

Q. Out on Rice Road?

A. That's right.

Q. Do you know Mr. Gustafson, the District Attorney? [fol. 175w] A. To some extent.

Q. Have you met socially with him?

A. Oh, I see him more fraternally.

Q. Clubs?

A. That's right.

Q. Do you feel that your acquaintance with him would affect your decision one way or another in this case?

A. No, not in the least.

Q. Have you read about this case, Mr. Pfeiler?

A. Certainly.

Q. Have you formed an opinion?

A. No, not definite, no.

Q. You feel you could hear the evidence with a fair and impartial mind?

A. Certainly.

Q. Do you feel that because Mrs. Duncan was sentenced to death that the death penalty should necessarily be imposed here?

A. No, I don't think that would have any weight to it.

Q. Do you know any reason at all why you couldn't be a fair and impartial juror in this case?

A. No, not at the present time.

Q. If the evidence in this case was such that it would appear that Mr. Baldonado should be given life imprison- [fol. 175x] ment, do you think that you could set aside

your previously formed opinion and judge the case purely on its merits?

A. Oh, if the evidence was strong enough, I would certainly consider it.

Q. It would take some substantial evidence to convince you, though, wouldn't it?

A. It would have to be substantial, certainly.

Mr. Danch: Pass for cause.

Mr. Gustafson:

Q. You don't know Mr. Danch, do you?

A. Pardon?

Q. Do you know Mr. Danch?

A. No, I have never met the gentleman.

Q. Do you know his client, Mr. Baldonado?

A. I don't think I have ever met him. I might have, but I don't think so.

Mr. Gustafson: Pass for cause.

The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury.

Mr. Danch: We will excuse Mr. Pfeiler. Thank you, sir.

The Court: Call another name.

The Clerk: James A. Baker, B-a-k-e-r.

(Prospective juror sworn.)

The Court: Where do you live, Mr. Baker?

The Prospective Juror: Ojai.

The Court: Ojai?

[fol. 175y] The Prospective Juror: Yes.

The Court: How long have you lived in this County?

The Prospective Juror: Eight years.

The Court: Have you ever served on a jury?

The Prospective Juror: No.

The Court: Do you know any reason why you couldn't serve on this jury?

The Prospective Juror: No.

The Court: Do you have any conscientious scruples against imposing or inflicting the death penalty in a murder case?

The Prospective Juror: No, I don't.

The Court: You may inquire.

Mr. Danch:

Q. What is your occupation, Mr. Baker?
A. I work a neon sign company.
Q. Have you ever been employed in police work?
A. No, I haven't.
Q. Were you in the armed forces?
A. Yes.
Q. Were you engaged in the Military Police in any way?
A. No.
Q. Do you know Mr. Gustafson, the District Attorney?
A. I know him as the District Attorney, is all.
Q. Not personally?
A. No.
[fol. 175z] Q. Do you know any of his deputies?
A. No, I don't.
Q. Have you read about this case, Mr. Baker?
A. Yes, I have.
Q. Have you formed an opinion as to what the penalty should be?
A. Yes.
Q. What is that opinion?
A. Death.
Q. Do you feel that that opinion is fixed and irrevocable?
A. It would take some pretty strong evidence to change it.
Q. Do you feel that it could be changed by some evidence?
A. Yes, possibly it could.
Q. You don't know what, though?
A. I don't know that much about the gentleman's background, but under certain circumstances I feel that he could be excused. I mean it could be weighed different ways.
Q. You would listen to all the evidence?
A. Yes.
Q. As impartially as you could?
A. Yes.
Q. Do you have any conscientious scruples against not imposing the death penalty?
[fol. 175aa] A. No.
Q. If you were on trial for your life would you be willing to have your case heard by 12 persons who are in the frame of mind that you are now in?

A. Yes, I think so.

Mr. Danch: Pass for cause, your Honor.

Mr. Gustafson:

Q. Do you know Mr. Danch?
A. No, I don't.
Q. You don't know his client, Mr. Baldonado?
A. No.

Mr. Gustafson: Pass for cause.
The Court: The peremptory is with the People.
Mr. Gustafson: I accept the jury as now constituted.
The Court: The peremptory is with the defendant.
Mr. Danch: We will excuse Mr. Hubbell. Thank you, Mr. Hubbell.
The Court: We have been going now for about an hour. We had better take a little recess.
Mr. Guastafson: Yes, your Honor.
The Court: The Court is about to take a short recess. All of you prospective jurors back there, keep your seats until this prospective jury gets out. Wait a minute.
We better call another name first and then take a recess.
The Clerk: Alvan L. Davis, D-a-v-i-s.

(Prospective juror sworn.)

[fol. 175bb] The Court: Your name is what?
The Prospective Juror: Alvan L. Davis.
The Court: Davis?
The Prospective Juror: Yes, sir.
The Court: Where do you live?
The Prospective Juror: Oxnard.
The Court: How long have you lived in this County?
The Prospective Juror: Close to four years, sir.
The Court: Four years. We will take a brief recess and then I will inquire further. Keep your seats now until this prospective jury gets out.

(Recess.)

The Court: The prospective jury are all present and in their proper places. You may proceed. Wait until I inquire of this last juror.
Do you have any conscientious scruples against imposing or inflicting the death penalty in a murder case?

The Prospective Juror: No, sir.

The Court: All right, you may inquire.

Mr. Gustafson: Counsel have stipulated that this juror be excused.

The Court: How is that?

Mr. Gustafson: Both counsel have stipulated that this juror be excused.

The Court: All right, you are excused.

Mr. Gustafson: Is that so stipulated, Mr. Danch?

[fol. 175cc] Mr. Danch: Yes, so stipulated.

The Court: Call another name.

The Clerk; Norman H. Rosenblad, R-o-s-e-n-b-l-a-d.

(Prospective juror sworn.)

The Court: Mr. Rosenblad, where do you live?

The Prospective Juror: Port Hueneme.

The Court: How long have you lived in Ventura County?

The Prospective Juror: Nine years.

The Court: Have you ever served on a jury?

The Prospective Juror: Municipal Court.

The Court: Other than that you have never served on a jury?

The Prospective Juror: No.

The Court: Do you have any conscientious scruples against inflicting or imposing the death penalty in a murder case?

The Prospective Juror: No, sir.

The Court: You may inquire.

Mr. Danch:

Q. What is your occupation, Mr. Rosenblad?

A. Inspector, missile inspector.

Q. Do you know Mr. Gustafson, the District Attorney?

A. No, sir.

Q. Or any of his deputies?

A. No, sir.

Q. Have you ever been employed in police work yourself?

[fol. 175dd] A. No, sir.

Q. Have you read about this case?

A. Yes, sir.

Q. Have you formed any opinion about the penalty yourself?

A. Yes, sir.

Q. Do you consider that the opinion is a fixed opinion?

A. I believe I do.

Q. You don't think the evidence can change it?

A. It would have to be very strong evidence before I would change it.

Q. Do you think it could be changed at all?

A. I don't believe so.

Mr. Danch: We will challenge for cause.

The Court: All right, the challenge is allowed.

Mr. Danch: That's all, Mr. Rosenblad.

The Court: Call another name.

The Clerk: Harley M. Cruzan, C-r-u-z-a-n.

(Prospective juror sworn.)

The Court: All right, where do you live, Mr. Cruzan?

The Prospective Juror: I live north of Oakview.

The Court: How long have you lived in this County?

The Prospective Juror: Since '51, I believe it was.

The Court: Have you ever served on a jury?

The Prospective Juror: No, sir.

[fol. 175ee] The Court: Do you have any conscientious scruples against imposing or inflicting the death penalty in a murder case?

The Prospective Juror: Yes, sir.

The Court: You do?

The Prospective Juror: Yes, sir.

Mr. Gustafson: Challenge for cause.

The Court: All right, the challenge is allowed. You are excused. Call another name.

The Clerk: Henry F. Eastwood, E-a-s-t-w-o-o-d.

(Prospective juror sworn.)

The Court: Where do you live, Mr. Eastwood?

The Prospective Juror: Oxnard.

The Court: Are you a relative of the Eastwoods over there?

The Prospective Juror: Yes.

The Court: What?

The Prospective Juror: Yes.

The Court: Are you related to Herb Eastwood?
The Prospective Juror: Nephew.
The Court: What?
The Prospective Juror: Nephew.
The Court: Nephew?
The Prospective Juror: Yes.
The Court: What is your father's name?
The Prospective Juror: Frank.
[fol. 175ff] The Court: oh, Frankie. You kind of outgrew my recollection, especially with that moustache. I used to know you.
The Prospective Juror: I'm afraid you have never known me. I've never worn a moustache.
The Court: Well, I knew your father all his life. In any event, did you ever serve on a jury?
The Prospective Juror: Yes, twice.
The Court: What?
The Prospective Juror: Twice.
The Court: In a criminal case?
The Prospective Juror: Yes, one.
The Court: Well, do you have any conscientious scruples against imposing or inflicting the death penalty in a murder case?
The Prospective Juror: No.
The Court: All right, you may inquire.

Mr. Danch:

Q. What is your occupation, Mr. Eastwood?
A. Serviceman for the Southern Counties Gas Company.
Q. Do you know Mr. Gustafson, the District Attorney?
A. No.
Q. The answer is "No"?
A. No.
Q. Do you know any of his Deputies?
[fol. 175gg] A. No, sir.
Q. Have you ever worked as a police officer or law enforcement?
A. No.
Q. Have you formed an opinion in this case as to what the penalty should be?
A. No, not definitely. Based on whatever is presented.

Q. You say "Not definitely." Have you given it some thought or had some discussion with other people?

A. Just normal discussion with fellow employees.

Q. Did any of these persons you discussed the case with purport to have any personal knowledge of the case?

A. No, just newspaper information.

Q. You at this time do not have an opinion as to what the penalty should be?

A. No.

Q. Do you know any reason at all why you could not be a fair and impartial juror in this case?

A. I don't know of any.

Mr. Danch: Pass for cause.

Mr. Gustafson:

Q. Do you know Mr. Danch?

A. No, sir.

Q. Do you know his client, Mr. Baldonado?

A. No.

Q. You realize that I am not required to prove anything [fol. 175hh] before you vote the death penalty?

A. Yes.

Q. That penalty, whether it is life or death, is solely in your discretion as a juror.

A. Yes.

Q. And you would accept the Judge's instructions to you that this defendant, Augustine Baldonado, did, in fact, commit murder in the first degree, that he pleaded guilty to doing so? You would, wouldn't you?

A. Yes.

Q. In other words, you would not go in there and say, "Well, maybe he isn't guilty of this"?

A. No.

Q. And you wouldn't go in there and say, "Well, maybe he was insane"?

A. No.

Q. If the Judge tells you that he is conclusively presumed to be sane and he is legally responsible for his act of murder?

A. Yes.

Q. Do you know of any reason why you couldn't give

my client, the People of the State of California, a fair and impartial trial in fixing his penalty?

A. No reason at all.

Mr. Gustafson: Pass for cause.

The Court: The peremptory is with the People,

[fol. 175ii] Mr. Gustafson: I accept the jury as now constituted.

The Court: The peremptory is with the defendant.

Mr. Danch: We will excuse Mr. Eastwood. Thank you.

The Court: Call another name.

The Clerk: Leo John Lorge, L-o-r-g-e.

(Prospective juror sworn.)

The Court: Mr. Lorge, where do you live?

The Prospective Juror: Oxnard.

The Court: How long have you lived in Ventura County?

The Prospective Juror: Four years.

The Court: Where did you live before that?

The Prospective Juror: Los Angeles.

The Court: What?

The Prospective Juror: Los Angeles.

The Court: Did you ever serve on a jury any place?

The Prospective Juror: No.

The Court: Well, you have been here all day so you know generally what this case is all about?

The Prospective Juror: Yes.

The Court: The defendant has plead guilty to murder in the first degree, so you don't have to consider his guilt or innocence at all. He has plead guilty. You only have to consider the penalty, life imprisonment or death, one or the other. That is the sole and exclusive province or discretion of the jury, as to which one should be inflicted. You understand that?

[fol. 175jj] The Prospective Juror: Yes, sir.

The Court: Do you have any scruples against inflicting or imposing the death penalty in a murder case?

The Prospective Juror: Yes.

The Court: You do.

Mr. Gustafson: Challenge for cause.

The Court: All right, the challenge is allowed. You are excused.

The Clerk: Howard E. Jensen, J-e-n-s-e-n.

(Prospective juror sworn.)

The Court: Where do you live, Mr. Jensen?

The Prospective Juror: I manage a wholesale electronics organization.

The Court: What is that?

The Prospective Juror: I manage a wholesale electronics organization in Oxnard.

The Court: How long have you lived in this County?

The prospective Juror: All my life.

The Court: Do you have any conscientious scruples against imposing or inflicting the death penalty in a murder case?

The Prospective Juror: Not altogether.

The Court: What?

The Prospective Juror: Not altogether.

The Court: You mean you do to some extent?

The Prospective Juror: I mean it would be difficult.

[fol. 175kk] The Court: Well, do you have some conscientious scruples against inflicting the death penalty?

The Prospective Juror: I feel it is a great responsibility.

The Court: Well, that goes without saying, but do you have any conscientious scruples against doing it?

The Prospective Juror: No.

The Court: What?

The Prospective Juror: No.

The Court: Well, you may inquire.

Mr. Danch:

Q. Are you married, Mr. Jensen?

A. Yes, sir.

Q. Do you have children?

A. One.

Q. What age?

A. A boy, 12.

Q. Have you read about this case in the papers?

A. To some extent, yes.

Q. Have you formed an opinion as to what the penalty should be?

A. No, sir.

Q. Do you feel that because Mrs. Duncan was sentenced to death that this defendant should also be sentenced to death?

A. Not without hearing the evidence.

Q. Pardon?

[fol. 1751l] A. Not without hearing the evidence.

Q. You wouldn't judge it on that fact alone?

A. That's right.

Q. You have heard Mr. Gustafson tell the other prospective jurors that there is no burden of proof here on either party. You are free to base your decision without requiring any quantum of proof on anybody; that is to say, it is not necessary for me to prove mitigating circumstances, it is not necessary for Mr. Gustafson to prove aggravating circumstances. You are to decide the case from what you hear and be guided by your own conscience. You are prepared to do that?

A. Yes.

Q. If you were so unfortunate to be on trial here for your life, would you be willing to have your case heard by 12 jurors who are in the frame of mind that you are now in?

A. I believe so.

Mr. Danch: Pass for cause.

Mr. Gustafson:

Q. Mr. Jensen, if you were sitting in my spot and were representing the People of the State of California and were going to ask the jury to impose the death penalty on this defendant, would you mind having a jury composed of 12 persons with your frame of mind toward the death penalty?

A. If I were in your position, sir? Without hearing the evidence, it would be difficult to answer that question.

[fol. 175mm] Q. Well, we are really talking not about what the evidence shows, but your frame of mind. In other words, I took it from your answer to Judge Blackstock that perhaps you have in your mind the idea that the death penalty is sort of a last resort penalty; that unless there were some particular evidence shown to you to merit the death penalty, you would impose life imprisonment as the penalty in any case where a person is guilty of first degree murder. It would take something extra-special to get the death penalty. Is that how you feel?

A. I feel that every man sitting in this final box will be the executioner, if that happens to be the verdict.

Q. Yes.

A. It's quite a responsibility.

Q. Yes, it is. But, of course, you would also realize, would you not, Mr. Jensen, that that is the spot that a lot of people in this case are in from the very beginning to the very end. The Grand Jury which indicated Mr. Baldonado, the prosecutor who asks for the death penalty, the jury, if the jury returns the death penalty, the Judge when he sentences the defendant, the Supreme Court when it views the case, many persons also share that same responsibility. Had they not done what they did, the defendant would not be executed, in other words.

A. That's right.

[fol. 175mm] Q. Would the fact that this is a grave and serious responsibility that all of us who have something to do with it share, would that fact cause you to fail to vote the death penalty because of the serious consequences there, even though you thought that really was the more appropriate penalty of the two permissible?

A. No, sir.

Q. Well, let's get back to that question I asked you previously. Do you have in your mind some fixed idea that even though there are two possible applicable penalties, that you wouldn't impose the death penalty unless certain things were proved to you?

A. It is my understanding that we will hear a certain amount of information before we are to——

Q. Well, no, Mr. Jensen. It probably will be true that you will hear something, but nobody knows at this moment whether you will hear anything other than you have already heard; namely, that the defendant has pleaded guilty to the first degree murder of Olga Duncan, because I may decide not to put on any evidence and maybe Mr. Danch would decide not to put on any evidence, and then the Judge would simply tell you, "All right, this defendant has pleaded guilty to the murder in the first degree of Olga Duncan. Go out and fix the penalty." That is theoretically possible, you see, and the law says that as between these two penalties the law doesn't favor either one; they are of [fol. 175oo] equal application to a case, depending solely and exclusively on how the jurors feel about it in the particular case. That is why I am trying to ascertain from you whether you have in your mind some kind of a

reservation that, well, unless you heard some particular type of evidence, you wouldn't vote for the death penalty. Some jurors could feel that way. They would have to hear something bad about the defendant's background, or something of that sort, before they would vote the death penalty. They wouldn't do it just on the basis that the man committed murder in the first degree. I am trying to ascertain from you whether that is your frame of mind because I took it from your answers that that probably was your frame of mind.

A. I believe I could be fair to both parties. That's all I could answer you.

Q. Let me ask you specifically again whether in the light of what I said whether you would be of the frame of mind that you would require from me something, which I don't know what it might be; only you know what your mind calls for, but you would require that I prove some particular thing before you would impose the death penalty?

A. You mean I would be obligated to sentence this man without any further information than I have right now?

Q. It might possibly be.

A. I don't believe I could be fair with you.

Q. Pardon?

A. I don't believe I could be fair with you.

[fol. 175pp] Q. You don't believe you could be fair with me under those circumstances?

A. No, sir.

Q. So that you do then have something in your mind that you would want to hear something of a particular nature about this particular man and about the crime before you would consider voting the death penalty?

Mr. Danch: Your Honor, I think that this line of questioning is going to a theoretical situation which doesn't exist and won't exist, and the purpose of this hearing is to introduce evidence. I don't think the question is a fair one to the juror. I don't think it serves any useful purpose.

The Court: Overruled. Go ahead.

Mr. Gustafson: I will pass for cause.

The Court: All right, the peremptory is with the People.

Mr. Gustafson: I will excuse Mr. Jensen.

The Court: Call another name.

The Clerk: Kimber S. Hood, H-o-o-d.

(Prospective juror sworn.)

The Court: Mr. Hood, where do you live?
The Prospective Juror: Valley Vista.
The Court: What?
The Prospective Juror: Valley Vista Tract.
The Court: How long have you lived in this County?
The Prospective Juror: About six years.
[fol. 175qq] The Court: Did you ever serve on a jury?
The Prospective Juror: No, sir.
The Court: You have been here all day, haven't you?
The Prospective Juror: Yes, sir.
The Court: You know what this case is all about?
The Prospective Juror: Yes, sir.
The Court: You know that the defendant has plead guilty to murder in the first degree and there is here for the jury to consider only the question of penalty. That will be either life imprisonment or death. You understand that?
The Prospective Juror: Yes.
The Court: Do you have any conscientious scruples against inflicting or imposing the death penalty in a murder case?
The Prospective Juror: Yes, sir.
Mr. Gustafson: Challenge for cause.
The Court: You are excused.
The Clerk: Alice B. Criss, C-r-i-s-s.

(Prospective juror sworn.)

The Court: Where do you live, Mrs. Criss?
The Prospective Juror: In Ventura.
The Court: How long have you lived here?
The Prospective Juror: About 21 years.
The Court: Have you ever served on a jury?
The Prospective Juror: No.
The Court: You know that this is a criminal case, don't [fol. 175rr] you?
The Prospective Juror: Yes.
The Court: And that this defendant here has plead guilty to murder in the first degree and you don't have to determine anything about his guilt or innocence; you understand that?
The Prospective Juror: Yes.

The Court: You are only here to determine what the penalty should be, life imprisonment or death.

Do you have any conscientious scruples about imposing the death penalty in a murder case?

The Prospective Juror: Yes, I do.

Mr. Gustafson: Challenge for cause.

The Court: All right, you are excused.

The Clerk: Claudia I. Jordan, J-o-r-d-a-n.

(Prospective juror sworn.)

The Court: Where do you live, Mrs. Jordan?

The Prospective Juror: Ojai.

The Court: How long have you lived in Ventura County?

The Prospective Juror: Forty years.

The Court: What?

The Prospective Juror: Forty years.

The Court: Have you ever served on a jury?

The Prospective Juror: Once.

The Court: In this County?

The Prospective Juror: Yes, sir.

[fol. 175ss] The Court: Do you have any conscientious scruples against imposing or inflicting the death penalty in a murder case?

The Prospective Juror: No, sir.

The Court: You may inquire.

Mr. Danch:

Q. Are you employed, Mrs. Jordan?

A. No, I'm a housewife.

Q. What is your husband's occupation?

A. He is a grocer.

Q. Where does he have his store?

A. Ojai.

Q. Have either you or your husband been employed in police work?

A. No.

Q. Do you know the District Attorney, Mr. Gustafson?

A. No, I don't.

Q. Or any of his Deputies?

A. No.

Q. Have you been reading about this case, Mrs. Jordan?

A. Well, yes.

Q. Have you formed an opinion?
A. No.
Q. Do you feel that because Mrs. Duncan was sentenced to death that this defendant should also necessarily be [fol. 175tt] sentenced to death?
A. No.
Q. Do you conscientiously feel that you could listen to the evidence to see whether or not there can be some distinguishing characteristics between these two defendants to see whether or not a different penalty should be imposed?
A. I do.
Q. If you had a son, Mrs. Jordan, who was on trial, as Mr. Baldonado is here, would you be willing to have his case tried by 12 persons who are in the frame of mind you are now in?
A. I would.
Q. Do you know any reason at all why you couldn't be a fair and impartial juror in this case?
A. No, I don't.

Mr. Danch: Pass for cause.

Mr. Gustafson:

Q. Mrs. Jordan, you don't know the defendant, do you?
A. No, I don't.
Q. Do you know Mr. Danch, his attorney?
A. No.
Q. Do you know any reason why you couldn't be fair to my side of the case, the People of the State of California?
A. No, I don't.

[fol. 175uu] Mr. Gustafson: Pass for cause.
The Court: The peremptory is with the defendant.
Mr. Danch: We will excuse Mr. Lyttle.
The Court: Call another name.
The Clerk: Margaret M. Dodds, D-o-d-d-s.

(Prospective juror sworn.)

The Court: Where do you live, Mrs. Dodds?
A. Ventura.
The Court: How long have you live in Ventura County?
The Prospective Juror: Since 1942.
The Court: Have you ever served as a juror?

The Prospective Juror: No.

The Court: Well, do you have any conscientious scruples against imposing or inflicting the death penalty in a murder case?

The Prospective Juror: No.

The Court: You may inquire.

Mr. Danch:

Q. Are you employed, Mrs. Dodds?

A. Yes, sir.

Q. Where do you work?

A. Ventura County Personnel Department.

Q. Ventura County Personnel Department?

A. Ventura County Personnel Department.

Q. Do you know Mr. Gustafson, the District Attorney?

A. Casually, as a department head.

[fol. 175vv] Q. Do you feel that your being employed by the County would affect your decision in any way whatsoever?

A. I don't feel so.

Q. Is there a Mr. Dodds?

A. Yes.

Q. How is he employed?

A. He is a contractor at Santa Barbara.

Q. Has either you or your husband been employed in police work?

A. No.

Q. Have you formed an opinion about this case as to the penalty, Mrs. Dodds?

A. I don't believe one that couldn't be changed.

Q. Do you feel you could listen to all of the evidence and make your mind up after you have heard all of the evidence and for the time being set aside the opinion that you now have?

A. I believe so.

Q. If you had a son who was on trial here, as Mr. Baldonado is, would you be willing to have his case heard by 12 persons who are in the frame of mind that you are now in?

A. Yes, sir.

Mr. Danch: Pass for cause.

Mr. Gustafson:

Q. Mrs. Dodds, do you know Mr. Danch?

A. No.

Q. You don't know his client, Mr. Baldonado?

[fol. 175ww]. A. No.

Q. You would, if you were selected as a juror, accept as a fact the fact that the defendant did commit murder in the first degree of Olga Duncan; that he was sane when he did it and fully and completely legally responsible for his acts; isn't that true?

A. That's right.

Q. And you wouldn't require that I prove some particular thing before you would vote the death penalty, would you?

A. No, I don't believe so.

Q. In other words, you haven't anything in your mind now that I don't know about that would say, would cause you to say, "Well, unless the District Attorney proves such and such, I am not going to vote for the death penalty"?

A. No.

Q. You realize that there is no burden of proof here either on me or on Mr. Danch?

A. Yes.

Q. The discretion rests solely with the jury as to what the penalty will be, and that will be exercised on the basis of the crime of which the defendant stands convicted and any evidence that may be presented here by either one; is that right?

A. Yes.

Q. This would be a very grave, serious decision to make [fol. 175xx] if you were to vote for a verdict fixing the penalty at death. Would the fact that this is a matter of such gravity preclude you from or keep you from voting for that verdict if in all logic and reason you realized that it would be the appropriate verdict to vote for?

A. No.

Q. Sometimes, Mrs. Dodds, with women it becomes an emotional problem there that has to be overcome, and I'm going to ask you whether you could overcome any such problem that might arise and vote according to your convictions regardless of the consequences?

A. I believe I could vote them.

Mr. Gustafson: Thank you. Pass for cause.
The Court: The peremptory is with the People.
Mr. Gustafson: I accept the jury as now constituted.
The Court: The peremptory is with the defendant.
Mr. Danch: We will excuse Mrs. Warren.
The Court: Call another name.
The Clerk: Eric Hepworth, H-e-p-w-o-r-t-h.

(Prospective juror sworn.)

The Court: Where do you live, Mr. Hepworth?
The Prospective Juror: Santa Paula.
The Court: How long have you lived in this County?
The Prospective Juror: Twenty-four years.
The Court: Have you ever served on a jury?
The Prospective Juror: Yes.
[fol. 175yy] The Court: Well, you have been here all day and you know what this case is all about. Do you have any conscientious scruples against inflicting or imposing the death penalty in a murder case?
The Prospective Juror: No.
The Court: You may inquire.

Mr. Danch:

Q. What is your occupation, Mr. Hepworth?
A. Mechanic.
Q. By whom are you employed?
A. Motor Service Company.
Q. Have you ever been employed as a police officer?
A. No.
Q. Do you know Mr. Gustafson here, the District Attorney?
A. No.
Q. Or any of his Deputies?
A. No.
Q. Are you married?
A. Yes.
Q. Do you have any children?
A. Yes.
Q. What are their ages?
A. Twenty-four and 27.
Q. Have you read about this case, Mr. Hepworth?
A. Yes.

Q. Have you formed an opinion as to what the penalty [fol. 175zz] should be?

A. No.

Q. Have you discussed the matter of penalty with other persons?

A. No.

Q. If one of your children were on trial here for his life, as Mr. Baldonado is, would you be willing to have your case heard by 12 people that are now in the frame of mind that you are in?

A. Yes.

Q. Have you or any member of your family even been the victim of a crime of this nature or serious assault?

A. No.

Q. Do you believe that you could be a fair and impartial juror in this case?

A. Yes.

Mr. Danch: Pass for cause.

Mr. Gustafson:

Q. You know of no reason why you would be unfair to my client, the People of the State of California?

A. No.

Q. You would accept the fact that the defendant is guilty of murder in the first degree and was sane at the time he committed this murder?

A. Yes.

Q. You do not have in your mind at the present time [fol. 175aaa] any preconceived notion that life imprisonment is a preferable penalty under the law to the death penalty?

A. No.

Q. You would accept the fact that either penalty is applicable, solely in the discretion of the jury, and the law doesn't prefer one to the other under any particular circumstances?

A. Yes.

Mr. Gustafson: Pass for the cause.

The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted.

The Court: The peremptory is with the defendant.

Mr. Danch: Excuse Mr. Baker. Thank you, Mr. Baker.
The Clerk: Ruth E. Garrison, G-a-r-r-i-s-o-n.

(Prospective juror sworn.)

The Court: Mrs. Garrison, do you have any conscientious scruples against imposing or inflicting the death penalty in a murder case?

The Prospective Juror: I do not.

The Court: You may inquire.

Mr. Danch:

Q. What is your occupation, Mrs. Garrison?

A. I'm a housewife now.

Q. What is your husband's occupation?

A. Oil worker.

Q. Have either you or your husband ever been employed in police work or law enforcement work?

[fol. 175bbb] A. No, sir.

Q. Do you know Mr. Gustafson, the District Attorney?

A. I do not.

Q. How long have you lived in Ventura County, Mrs. Garrison?

A. Fifteen years.

Q. Where did you live prior to that time?

A. Denver, Colorado.

Q. Have you read about this case?

A. Yes.

Q. Have you formed an opinion as to what the penalty should be?

A. Yes.

Q. What is that penalty?

A. The death penalty.

Q. Do you feel that is a fixed opinion?

A. Not exactly.

Q. Pretty close to it?

A. Pretty close.

Q. Do you feel that any evidence could be introduced that would change that opinion?

A. Yes, I have a son 21 years old and I think that would make me feel differently.

Q. If this son of yours were on trial, would you be

willing to have his case heard by 12 persons who are in [fol. 175ccc] the frame of mind that you are now in?

A. Yes, sir.

Mr. Danch: Pass for cause.

Mr. Gustafson:

Q. Do you know Mr. Danch?

A. No, I do not.

Mr. Gustafson: Pass for cause.

The Court: The peremptory is now with the People.

Mr. Gustafson: I will accept the jury as now constituted.

The Court: The peremptory is with the defendant.

Mr. Danch: We will excuse Mr. Hepworth. Thank you, Mr. Hepworth.

The Court: You know you only have one more challenge.

The Clerk: Axel Johnson, J-o-h-n-s-o-n.

(Prospective juror sworn.)

The Court: Mr. Johnson, do you have any conscientious scruples against imposing or inflicting the death penalty in a murder case?

The Prospective Juror: I have not.

The Court: You may inquire.

Mr. Danch:

Q. What is your occupation, Mr. Johnson?

A. I am an engineer and work for the Southern Pacific Milling Company.

Q. Where do you live, Mr. Johnson?

A. Montalvo.

Q. How long have you lived in Ventura County?

[fol. 175ddd] A. Five years the 1st of May, this year.

Q. Where did you live prior to that time?

A. San Luis Obispo.

Q. Do you know Mr. Gustafson, the District Attorney?

A. No, only as the District Attorney.

Q. Do you know any of his Deputies?

A. No.

Q. Have you been involved in police work yourself?

A. No.

Q. Any member of your family?

A. No.

Q. Have you read about this case, Mr. Johnson?

A. Yes.

Q. Have you formed an opinion as to what the penalty should be?

A. No, my mind is flexible until I hear the arguments on the case.

Q. Do you have any children?

A. Two.

Q. What are their ages?

A. Three and 5.

Q. Do you believe that you could be a fair and impartial juror in this case, Mr. Johnson?

A. As far as I know.

Q. Have you ever served on a criminal jury before?

[fol. 175eee] A. Not in the State of California.

Q. What state was that in?

A. State of Wyoming, County of Big Horn.

Q. Was that a homicide case?

A. No.

Mr. Danch: Pass for cause, your Honor.

Mr. Gustafson:

Q. Do you know Mr. Danch?

A. No, I do not.

Q. You don't know his client?

A. No.

Q. Now, you said your mind would be flexible until you heard the evidence and the arguments. Let me ask you this. Mr. Johnson: Would it also be flexible so that if you went into the jury room and you felt that the verdict, you should fix the penalty at one particular thing and your fellow jurors disagreed, and then as they talked about the case they convinced you that your first opinion was wrong and that you should join them. You wouldn't hestitate to change your opinion if you were convinced that you were wrong in the first place, would you?

A. No.

Q. You don't know of any reason why you couldn't be fair to my client, the People of the State of California, in this matter, do you?

A. No, not that I know of.

Q. You would accept the fact that the defendant has [fol. 175fff] committed murder in the first degree and was sane at the time he did it and now?

A. Yes.

Mr. Gustafson: Pass for cause.

The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted.

The Court: The peremptory is with the defendant.

Mr. Danch: We will excuse Mr. Johnson. Thank you.

The Court? Call another name.

The Clerk: John Martell, M-a-r-t-e-l-l.

(Prospective juror sworn.)

The Court: Did you ever serve on a jury?

The Prospective Juror: No, your Honor.

The Court: Do you have any conscientious scruples against inflicting or imposing the death penalty in a murder case?

The Prospective Juror: No.

The Court: You have none?

The Prospective Juror: Beg pardon, sir?

The Court: You do not have any conscientious scruples?

The Prospective Juror: No, no.

The Court: All right, you may inquire.

Mr. Danch:

Q. What is your occupation, Mr. Martell?

A. Cement mason.

Q. By whom are you employed?

A. Trico Concrete Company, Ventura.

[fol. 175ggg] Q. Do you know Mr. Gustafson, the District Attorney?

A. No.

Q. Or any of his Deputies?

A. No.

Q. Have you ever been employed as a police officer, Mr. Martell?

A. No.

Q. Have you read about this case?

A. Yes.

Q. Have you formed an opinion as to what the penalty should be?

A. Yes, sir, I have, because I know the family pretty well.

Q. You do know the family?

A. Absolutely.

Q. Is your opinion based on what you know about the family or what you read or both?

A. I think it would be, yes, sir. I don't think it would be fair for me.

Q. I beg your pardon?

A. I don't think it would be fair, a fair decision. I know the whole family, even his father.

Q. You don't think you could be a fair and impartial juror in this case?

A. No.

[fol. 175hhh] Mr. Danch: Challenge for cause, your Honor.

The Court: You have such an opinion about this case that you feel it wouldn't be fair for you to serve on the jury; is that right?

The Prospective Juror: Yes, sir.

The Court: You are excused. Challenge allowed. Call another name.

The Clerk: Zetha Holthe, H-o-l-t-h-e.

(Prospective juror sworn.)

The Court: Mrs. Holthe, where do you live?

The Prospective Juror: Oakview.

The Court: How long have you lived in Ventura County?

The Prospective Juror: Thirteen years.

The Court: Have you ever served on a jury?

The Prospective Juror: Yes, sir.

The Court: Here?

The Prospective Juror: Yes, sir.

The Court: Well, you know what this case is all about. You have been here all day, haven't you?

The Prospective Juror: Yes, sir.

The Court: So you know the jury is here only for the purpose of fixing the penalty. It has got to be one of two things, death or life imprisonment. You understand that?

The Prospective Juror: Yes, sir.

The Court: Do you have any conscientious scruples against imposing the death penalty in a murder case?
[fol. 175iii] The Prospective Juror: No, sir.
The Court: All right.

Mr. Danch:

Q. What is your occupation, Mrs. Holthe?
A. I a am tabulating machine operator with the County.
Q. Do you know Mr. Gustafson, the District Attorney here?
A. Just to see him, never to speak to him.
Q. Do you think that your employment with the County would influence your decision one way or the other?
A. No, sir.
Q. The fact that the District Attorney, an employee of the County, will be asking for one particular punishment wouldn't affect your decision merely because of the fact that you are an employee of the County, would it?
A. No, I see no reason.
Q. You wouldn't be afraid to make a decision one way or the other because of that?
A. No, sir.
Q. Have your read about this case?
A. Yes, sir.
Q. Have you formed an opinion as to what the penalty should be?
A. Yes, sir.
Q. Is that penalty the death penalty?
A. Yes, sir.
[fol. 175jjj] Q. Do you consider that a fixed opinion?
A. Not altogether.
Q. Do you feel that you could review or hear the evidence that will be presented fairly and impartially despite this opinion that you have?
A. Yes.
Q. Is your opinion based on evidence that you heard or read about being presented in Mrs. Duncan's case?
A. That's right.
Q. Do you feel at this moment that I could present any evidence at all that would change your mind?
A. Well, I feel it would have to be strong evidence.
Q. You feel that it could be done, though?

A. Yes.

Q. Do you have any conscientious scruples against life imprisonment?

A. Do I understand this sentence to be the same as it was in the case of Mrs. Duncan, where after so many years she could be paroled?

Q. Well, those questions will be decided for you by the Court, but those are some of the elements that are entering into your mind now?

A. Yes. If that is involved, then I am against it.

[fol. 175kkk] Q. If there were any consideration of parole, then you would be——

A. Against it.

Q. You would vote for the death penalty and nothing could change your mind?

A. It would have to be strong.

Q. Could anything change your mind?

A. Could anything change my mind?

Q. Yes, that fact.

A. Well, conscience or truth.

Q. Pardon?

A. If I think it was the truth. If I felt it was strong enough and it was the truth, why, certainly.

Q. If it develops here in the trial or during the Court's instructions that there is a possibility of parole, then nothing could change your mind as far as the death penalty is concerned; is that true?

A. You mean to say that in the case of the trial if it were set that after so many years of good behavior they could be paroled——

Q. Yes.

A. Would that affect me?

Q. If that fact does appear, could anything change your mind then so far as the death penalty is concerned or would you vote for the death penalty regardless of what other evidence is introduced?

A. Like I said before, if it was strong and the truth, [fol. 175lll] why, you would have to weigh the evidence.

Q. Even though there was a possibility of parole, you think you might possibly be induced to vote for life imprisonment?

A. If it's good evidence.

Q. If you had a son approximately the age of Mr. Bal-

donado and he was on trial for his life, would you want his case, trial on penalty be heard by 12 persons who are now in the frame of mind that you are in?

A. Absolutely.

Q. Pardon?

A. Absolutely. I feel I am fair.

Q. You would want 12 persons who were pretty firmly convinced that the death penalty was a solution to hear your son's case?

A. Yes.

Mr. Danch: Pass for cause, your Honor.

Mr. Gustafson:

Q. You wouldn't, would you, Mrs. Holthe, lean over backwards because you are a County employee and because I work for the County, to be unfair to my side of the case, would you?

A. No.

Q. You would detach yourself from your County employment and consider this case in the same light that the other jurors are considering it?

A. Absolutely.

[fol. 175mmm] Q. And you would accept the fact, would you not, Mrs. Holthe, that the defendant is guilty of the murder of Olga Duncan, guilty of murder in the first degree and that he was sane at the time he did it and is legally responsible for his acts?

A. That's right.

Mr. Gustafson: Pass for cause.

The Court: All right.

Mr. Danch: Your Honor, I think I will challenge this juror for cause.

The Court: You passed your challenge.

Mr. Danch: Yes, but I would like to withdraw that and challenge this juror for cause.

The Court: What?

Mr. Danch: I would like to challenge this juror for cause, though. I think that her expression of conviction is so strong that she cannot fairly try this case.

The Court: Are you resisting the challenge?

Mr. Danch: I offer the challenge for cause.

The Court: Are you resisting the challenge?

Mr. Gustafson: No, your Honor.

The Court: All right, you are excused. Call another name.

The Clerk: Charles F. Lane, L-a-n-e.

(Prospective juror swprn.)

The Court: Where do you live, Mr. Lane?

[fol. 175nnn] The Prospective Juror: Oxnard.

The Court: How long have you lived in this County?

The Prospective Juror: Ten years.

The Court: Did you ever serve on a jury?

The Prospective Juror: No, sir.

The Court: Do you have any conscientious scruples against imposing or inflicting the death penalty in a murder case?

The Prospective Juror: None at all.

The Court: You may inquire.

Mr. Danch:

Q. What is your occupation, Mr. Lane?

A. I am a foreman for the American Crystal Sugar Company.

Q. How long have you been so employed?

A. Oh, around 12 years.

Q. Are you married?

A. Yes, sir.

Q. Do you have any children?

A. One daughter.

Q. How old is she?

A. Fifteen.

Q. Do you know the District Attorney, Mr. Gustafson?

A. No, sir.

Q. Or any of his deputies?

A. No.

[fol. 175ooo] Q. Have you read about this case, Mr. Lane?

A. Yes, sir.

Q. You have been following the trial in the paper off and on?

A. Yes.

Q. Have you formed an opinion as to what the penalty should be in this case?

A. Yes, I have.
Q. What is that penalty?
A. Death.
Q. Is that a fixed opinion in your mind?
A. Due to the nature of the crime and a man who pleaded guilty to first degree, premeditated murder, there could be no other penalty.
Q. Nothing that I could bring in would cause you to change your mind?
A. Nothing.

Mr. Danch: We challenge for cause, your Honor.
The Court: All right, challenge allowed. You are excused. Call another name.
The Clerk: William H. Fear, F-e-a-r.

(Prospective juror sworn.)

The Court: Where do you live, Mr. Fear?
The Prospective Juror: In Ventura.
The Court: How long have you lived in this County?
The Prospective Juror: Twenty-five years.
[fol. 175ppp] The Court: Did you ever serve on a jury?
The Prospective Juror: Yes, sir.
The Court: Do you know any reason why you could not be fair and impartial to both sides if you serve on this jury?
The Prospective Juror: No.
The Court: Do you have any conscientious scruples against imposing or inflicting the death penalty in a murder case?
The Prospective Juror: No.
The Court: You may inquire.

Mr. Danch:

Q. Mr. Fear, you do know me, is that true?
A. Yes, I do, John.
Q. We are members of the same service club?
A. Yes.
Q. I guess we were on the Chamber of Commerce board at one time together?
A. Right.
Q. Do you feel that because of that association your decision would be influenced one way or the other?

A. No, sir.

Q. You have read about this case, have you not, Mr. Fear?

A. I guess as much as anyone.

Q. Have you formed an opinion as to what the penalty should be?

[fol. 175qqq] A. No.

Q. You feel your mind is open on that question?

A. Yes.

Q. You have no conscientious opinion against life imprisonment, do you?

A. No.

Q. You feel that in an appropriate case it might be imposed?

A. Yes.

Q. If you had a son that was on trial for his life, would you be willing to have his case heard by 12 jurors who are in the frame of mind that you are now in?

A. Yes.

Mr. Danch: We will pass for cause.

Mr. Gustafson: Pass for cause.

The Court: All right, swear the jury.

Mr. Gustafson: No, no, your Honor. I have peremptories left.

The Court: That is right. You have a peremptory, if you want to exercise it.

Mr. Gustafson: I have 18 peremptories.

The Court: I know you have, but you may exercise your peremptory now, if you want to.

Mr. Gustafson: Yes, I do. I excuse Mr. Fear.

The Clerk: Jerry L. McCarty, M-c-C-a-r-t-y, McCarty.

(Prospective juror sworn.)

[fol. 175rrr] The Court: Where do you live, Mr. McCarty?

The Prospective Juror: Oxnard.

The Court: What?

The Prospective Juror: Where do I live?

The Court: Where do you live?

The Prospective Juror: Oxnard.

The Court: How long have you lived in this County?

The Prospective Juror: Nine years.

The Court: Did you ever serve on a jury?

The Prospective Juror: No, sir

The Court: Do you have any conscientious scruples against inflicting or imposing the death penalty in a murder case?

The Prospective Juror: No, sir.

The Court: You may inquire.

Mr. Danch:

Q. What is your occupation, Mr. McCarty?

A. Service station work.

Q. Do you know Mr. Gustafson, the District Attorney?

A. No, sir.

Q. Or any of his Deputies?

A. No, sir.

Q. Have you or any member of your family ever been involved in police work?

A. No, sir.

Q. Have you read about this case?

A. I have.

[fol. 175sss] Q. Have you formed an opinion as to what the penalty should be in this case?

A. No, sir, not at this time.

Q. Pardon?

A. Not at this time.

Q. Do you feel because Mrs. Duncan was sentenced to death that this defendant should also be sentenced to death?

A. Not entirely.

Q. Do you feel that there could be evidence introduced in here that might lead you to believe that life imprisonment was the suitable punishment in this case?

A. It is possible.

Q. You feel that you could set aside the opinion that you now have and listen to all of the evidence here before you would make up your mind finally?

A. After hearing the evidence, I might.

Q. You say you might?

A. I might after hearing the evidence.

Q. Do you feel that at this time it is necessary for me to introduce something in mitigation before you can bring in a sentence of life imprisonment or will you listen and can you listen to the Judge's instructions that it is entirely

within your discretion whatever sentence you want to impose in this case?

A. I can listen.

[fol. 175ttt] Q. If you were on trial, Mr. McCarty, for your life, as Mr. Baldonado is, would you be willing to have your case heard by 12 persons who are in the frame of mind that you are now in?

A. I would.

Mr. Danch: We will pass for cause.

Mr. Gustafson: Pass for cause, your Honor.

The Court: Do you want to exercise your peremptory?

Mr. Gustafson: Yes, I excuse Mr. McCarty.

The Court: All right. Call another name.

[fol. 175-1] The Clerk: Charles—initial "S."—Adams—A-d-a-m-s.

(The prospective juror was sworn.)

The Court: Where do you live, Mr. Adams?

The Prospective Juror: Camarillo Heights.

The Court: How long have you lived in this County?

The Prospective Juror: Sixteen years.

The Court: Do you have any conscientious objections against imposing the death penalty in a murder case?

The Prospective Juror: I do.

The Court: You have?

The Prospective Juror: Yes, sir.

Mr. Gustafson: Challenge for cause.

The Court: You are excused. Call another name.

(The prospective juror was excused.)

The Clerk: Initials "R." "E." Dorner—D-o-r-n-e-r.

(The prospective juror was sworn.)

The Court: You pronounce your name "Dorner"?

The Prospective Juror: Yes, sir.

The Court: Dorner?

The Prospective Juror: Yes, sir.

The Court: Where do you live, Mr. Dorner?

The Prospective Juror: Oxnard.

The Court: How long have you lived in this County?

The Prospective Juror: All my life.

The Court: Do you have any conscientious scruples [fol. 175-2] against imposing the death penalty in a murder case?

The Prospective Juror: No, sir.
The Court: What?
The Prospective Juror: No, sir.
The Court: All right. You may inquire.

Examination.

Mr. Danch:

Q. What is your occupation, Mr. Dorner?
A. I am an office clerk.
Q. For whom?
A. Richfield Oil Company.
Q. Are you married?
A. No, sir.
Q. Have you read about this case before?
A. Some, yes, sir.
Q. Have you formed an opinion as to what the penalty should be?
A. No, sir.
Q. Do you feel at this time that there is a possibility that I could introduce some evidence that might conscientiously allow you to impose life imprisonment as a punishment?
A. Yes.
Q. You have no fixed opinions at this time as to what should be done in this case?
A. No, sir
[fol. 175-3] Q. Do you know Mr. Gustafson, the District Attorney?
A. No, sir.
Q. Have you ever served on a jury before?
A. No, sir.
Q. Do you believe that you could be a fair and impartial juror in this matter?
A. Yes.

Mr. Danch: We will pass for cause, your Honor.

Mr. Gustafson:

Q. Do you know Mr. Danch, Mr. Dorner?
A. No.
Q. You don't know his client, do you?
A. No.

Q. And you realize that I don't bear any particular burden of proving to you that certain facts are so, before you will impose the death penalty?

A. Yes.

Q. You realize that, in other words, that I don't have any burden of proof, nor does Mr. Danch, that the penalty that you select will be based solely on whatever you choose and whatever you choose to give weight to as factors in that determination?

A. Yes, sir.

Q. And you will accept the fact that the defendant is guilty of the first degree murder of Olga Duncan and that he was sane when he did so?

[fol. 175-4] A. Yes, sir.

Mr. Gustafson: Pass for cause.

The Court: All right. The peremptory is again with the People.

Mr. Gustafson: I will excuse Mr. Plymale.

(The prospective juror was excused.)

The Clerk: Violet—initial "V"—Thurman—T-h-u-r-m-a-n. Is that Mrs.?

The Prospective Juror: Mrs.

The Clerk: Mrs. Thurman.

(The prospective juror was sworn.)

The Court: Where do you live, Mrs. Thurman?

The Prospective Juror: Santa Paula.

The Court: How long have you lived in this County?

The Prospective Juror: Well, except for nine years, all my life.

The Court: Do you have any conscientious scruples against imposing or inflicting the death penalty in a murder case?

The Prospective Juror: No, sir.

The Court: All right. You may inquire.

Examination.

Mr. Danch:

Q. Are you employed, Mrs. Thurman?
A. Yes, I am.
Q. By whom?
[fol. 175-5] A. The Navy Department, the Construction Battalion Center.
Q. And is your husband employed?
A. Yes, sir.
Q. Where is he employed?
A. The County.
Q. What is his occupation?
A. Maintenance, labor.
Q. Do you have any children?
A. No, I don't.
Q. Do you know Mr. Gustafson, the District Attorney?
A. No, I don't.
Q. Do you know any of his Deputies personally?
A. I know a Mr. Seguro. He lived in Santa Paula years ago.
Q. The Deputy Sheriff?
A. If that is the one.
Q. Have you or your husband ever been employed in police work?
A. No.
Q. Have you read about this case?
A. Yes, sir.
Q. Have you formed an opinion as to what the penalty should be?
A. Well, I believe that I have, sir, after hearing Mr. [fol. 175-6] Baldonado's plea.
Q. Is that a fixed opinion; that is to say, can it be changed by evidence adduced here in court?
A. Yes.
Q. You think that it could be?
A. Yes.
Q. Do you think that you could set aside your opinion while this trial is in progress and listen to the evidence fairly and impartially?
A. I don't think so, sir.

Q. You don't think that you could be a fair and impartial juror in this case?

A. I don't think so, no.

Mr. Danch: We will challenge for cause, your Honor.

The Court: You pass for cause?

Mr. Gustafson: No. He challenged for cause.

Mr. Danch: I challenged for cause.

The Court: I thought you passed for cause. You are resisting the challenge?

Mr. Gustafson: No, your Honor.

The Court: You are excused.

(The prospective juror was excused.)

The Clerk: Bernice Clark,—C l a r k. Is it Mrs.?

The Prospective Juror: Mrs.

The Clerk: Mrs. Clark.

(The prospective juror was sworn.)

[fol. 175-7] The Court: Where do you live, Mrs. Clark?

The Prospective Juror: In Oxnard.

The Court: How long have you lived in this County?

The Prospective Juror: Most of my life.

The Court: Do you have any conscientious scruples against imposing the death penalty in a murder case?

The Prospective Juror: No, I don't.

The Court: All right. You may inquire.

Examination.

Mr. Danch:

Q. Mrs. Clark, your husband was formerly Chief of Police of Oxnard, is that true?

A. That is correct.

Q. And you know the District Attorney quite well?

A. As well as I do you.

Q. Do you feel that your acquaintanceship with him would influence your decision in any way at all here?

A. I think not.

Q. Mr. Gustafson once made a rather impassioned radio plea in behalf of your husband when he was a candidate for Sheriff, is that true?

A. Yes, it is.

Q. Do you think that th t would prejudice your decision in any way at all?

A. I don't think that it would at all.

Q. Have you read newspaper stories about this trial?

[fol. 175-8] A. I have.

Q. About Mrs. Duncan's trial, I should say.

A. Yes.

Q. Do you feel that you have formed an opinion as to what the penalty should be in this case?

A. No actual opinion, no, just impulsive thinking perhaps.

Q. And you are prepared to set aside that thinking and listen to all the evidence in this case before you make up your mind finally?

A. Yes.

Q. Do you know Mr. Baldonado, the defendant?

A. No, I do not.

Q. Do you know anything about him?

A. Nothing.

Q. Of a personal knowledge?

A. No.

Q. Just what you have read in the papers?

A. Yes.

Q. If you had a son who was on trial here for his life, as Mr. Baldonado is, would you have been willing to have his case heard by 12 jurors in the frame of mind that you are now in?

A. I think so.

Q. Do you know of any reason at all why you couldn't [fol. 175-9] be a fair and impartial juror in this case?

A. I know of none.

Mr. Danch: Pass for cause.

Mr. Gustafson:

Q. Mrs. Clark, by reason of what Mr. Danch said about my radio speech once in favor of your husband, you wouldn't lean over backwards against my side of the case just to try to be extremely and overly fair to Mr. Danch?

A. Not at all. I think that I would be thinking about Mr. Baldonado.

Q. So that as far as your frame of mind is concerned, you would give a fair trial to Mr. Baldonado and you would give a fair trial to the People of the State of California, my client?

A. I am sure.

Q. You would accept the fact, would you not, Mrs. Clark, that the defendant is guilty of murdering Olga Duncan and that was he sane when he did it?

A. I heard him so plead.

The Court: Pass for cause?

Mr. Gustafson: Pass for cause.

The Court: All right. The peremptory is with the People.

Mr. Gustafson: I accept the jury, your Honor.

The Court: All right. Swear the jury.

(The jury was sworn.)

The Court: Ladies and gentlemen of this jury panel—— [fol. 175-10] Mr. Gustafson: Your Honor, are any alternates going to be selected?

The Court: Do you want to select some alternates?

Mr. Gustafson: I don't know how prolonged the trial will be. If it is going to last as long as Mr. Danch indicated, a week, I think——

Mr. Danch: It won't last that long. I thought that it would take longer to pick a jury than this, your Honor. I think that our evidence will probably take a day and a half, depending on getting the witnesses here on time. There might be some trouble there. But I think that it should be completed by Wednesday, the presentation of the evidence, at any rate.

Mr. Gustafson: Well, in that case, your Honor, the case is not going to take any longer than the ordinary case would take, and perhaps we wouldn't need any alternates. We might select one alternate.

The Court: I think we ought to have one alternate.

The Clerk: Roger—initial "L"—Coleman—C-o-l-e-m-a-n.

(The prospective juror was sworn.)

The Court: C-o-l-e-m-a-n?

The Clerk: Right, your Honor.

The Court: Where do you live, Mr. Coleman?

The Prospective Juror: Santa Paula.

The Court: How long have you lived in this County?

The Prospective Juror: Twenty-four years.

[fol. 175-11] The Court: Do you have any conscientious scruples against imposing the death penalty in a murder case?

The Prospective Juror: No.

The Court: All right, you may inquire.

Examination.

Mr. Danch:

Q. What is your occupation, Mr. Coleman?

A. Truck driver, heavy transportation.

Q. Truck driver. For whom do you work?

A. Lyon, Ventura.

Q. Are you married?

A. Yes.

Q. Do you have any children?

A. Three.

Q. What are their ages?

A. Five, 6 and 8.

Q. Do you know the District Attorney, Mr. Gustafson?

A. No.

Q. Have you or any member of your family, Mr. Coleman, ever been employed in police work?

A. No.

Q. Have you read about Mrs. Duncan's trial and the incidents preceding the trial?

A. Off and on.

Q. Have you formed an opinion as to what the penalty [fol. 175-12] should be in this case?

A. Through the papers, yes.

Q. Do you feel that that opinion is fixed in your mind so that it cannot be changed by evidence?

A. It would have to be awfully strong.

Q. You feel that that opinion would color your thinking in your deliberations in this case?

A. Well, I really don't think it would but I just don't think you got it.

Q. You don't think I can bring in any evidence to change your mind, is that true?

A. No, it can be changed, but it would have to be awfully good.

Q. If you were on trial for your life, would you want to be tried by 12 persons in the frame of mind that you are now in?

A. If you can show proof that it is not true, well, yes.

Q. That he didn't commit this act, you mean?

A. Yes.

Q. Well, that is already admitted that he has. The only question here will be the penalty.

A. Yes, I would.

Q. Is your opinion fixed then, and there is nothing to change it?

A. No.

[fol. 175-13] Mr. Danch: Challenge for cause.

The Court: Well, the challenge will have to be allowed. It is not resisted. The challenge is allowed. You are excused.

(The prospective juror was excused.)

The Clerk: Louis—L-o-u-i-s—Oliver—O-l-i-v-e-r.

(The prospective juror was sworn.)

The Court: Mr. Oliver, you live near Moorpark?

The Prospective Juror: All my life.

The Court: Do you have any conscientious scruples against imposing the death penalty in a murder case?

The Prospective Juror: Yes, I do.

Mr. Gustafson: Challenge for cause.

The Court: All right, you are excused.

(The prospective juror was excused.)

The Clerk: Mrs. Elmadey Gray. E-l-m-a-d-e-y is the first name. Gray—G-r-a-y.

(The prospective juror was sworn.)

The Court: Where do you live, Mrs. Gray?

The Prospective Juror: Hueneme.

The Court: How long have you lived in this County?

The Prospective Juror: Ten years.

The Court: Did you ever serve on a jury?

The Prospective Juror: No, sir.

The Court: Do you have any conscientious scruples against imposing the death penalty in a murder case?

The Prospective Juror: Yes, I do.

[fol. 175-14] The Court: What?

The Prospective Juror: Yes, I do.

The Court: All right.

Mr. Gustafson: Challenge for cause.

The Court: You are excused.

(The prospective juror was excused.)

The Clerk: Frank Oliver—O-l-i-v-e-r.

(The prospective juror was sworn.)

The Court: Mr. Oliver, you are related to the Oliver that was just excused, are you not?

The Prospective Juror: No, I am not.

The Court: No relationship?

The Prospective Juror: No relationship.

The Court: Do you have any conscientious scruples against imposing the death penalty in a murder case?

The Prospective Juror: I have not.

The Court: You may inquire.

Examination.

Mr. Danch:

Q. What is your occupation, Mr. Oliver?

A. Construction superintendent.

Q. For whom?

A. Ralph T. Viola.

Q. Do you know the District Attorney, Mr. Gustafson?

A. No, I do not.

[fol. 175-15] Q. Do you know any of his deputies?

A. No, I do not.

Q. Are you married, Mr. Oliver?

A. Yes, I am.

Q. And do you have any children?

A. Three.

Q. What are their ages?

A. Sixteen, 13 and 12.

Q. Have you read about the case of Mrs. Duncan?

A. Very little.

Q. Have you formed an opinion as to what the penalty should be in this case?

A. I have no opinions on this case.

Q. You think that you can be a fair and impartial juror in this case?

A. Repeat that question again.

Q. You feel that you can be a fair and impartial juror in this case?

A. I feel I can.

Q. If your son were on trial for his life, as Mr. Baldonado is here, would you be willing to have his case heard by 12 jurors in the same frame of mind that you are in now?

A. If the 12 jurors were picked by the Judge, I would.

Q. I didn't hear what you said.

A. Repeat.

[fols. 175-16-307] Q. Would you be willing to have your son tried by 12 people in the same frame of mind you are in now?

A. I would.

Q. Do you know of any reason why you could not be a fair and impartial juror?

A. I know of no reason.

Mr. Danch: We will pass for cause.

Mr. Gustafson: Pass for cause.

The Court: You pass for cause?

Mr. Gustafson: Pass for cause.

The Court. The peremptory is with the People.

Mr. Gustafson: Pass peremptory.

Mr. Danch: We will pass peremptory.

(Frank Oliver was sworn as an alternate juror.)

The Court: All right, now, ladies and gentlemen of this jury panel, we have a jury. Your services will not be needed any longer in this case. Your checks for mileage and per diem will be mailed to you. And after this jury passes out, you will be excused.

Ladies and gentlemen of the jury, you are excused until 10:00 o'clock tomorrow morning.

[fol. 308] STATEMENT OF COURT RE PHOTOGRAPHS AND RECORDINGS

The Court: Listen, all of the reporters. I have concluded that there must be no photographs taken in the Courtroom, certainly no recordings of any kind.

I gave that order before. It seems that somebody got some recordings in the face of my admonition not to have them. So there will be no photographs, no recordings, or anything of that kind.

The jury are all present and in their proper places.

[fol. 309] THE PEOPLE, Respondent,

v.

AUGUSTINE BALDONADO, Appellant

(Crim. No. 6489. In Bank.)

OPINION—March 11, 1960

Appeal (automatically taken under Pen Code. § 1239, subd. (b)) from a judgment of the Superior Court of Ventura County and from an order denying a new trial. Charles F. Blackstock, Judge. Affirmed.

Prosecution for murder. Judgment of conviction imposing the death penalty, affirmed.

John R. Danch, under appointment by the Supreme Court, and Burt M. Henson for Appellant.

A. L. Wirin, Gerald L. Rosen and Richard L. Lissner as Amici Curiae on behalf of Appellant.

Stanley Mosk, Attorney General, William E. James, Assistant Attorney General, and Roy A. Gustafson, District Attorney (Ventura), for Respondent.

Gibson, C. J.—Defendant and Luis Moya were indicted jointly with Elizabeth Duncan for the murder of her daugh- [fol. 310] ter-in-law, Olga Duncan. Defendant pleaded guilty to murder in the first degree, and, upon a trial by jury on the sole issue of penalty, his punishment was fixed at death. His motion for a new trial was denied, and the

appeal comes to us automatically under subdivision (b) of section 1239 of the Penal Code.[1]

A motion for change of venue made by defendant on the ground that he could not receive a fair and impartial trial in Ventura County was denied. The evidence produced by defendant was much the same as that before the court on a like motion in *People* v. *Duncan, ante,* * p. —— [—— P.2d ——] The court did not abuse its discretion in refusing to remove the action to another county.

A transcript of the testimony of defendant before the grand jury, in which he related how he and Moya planned and committed the murder of Olga Duncan, was introduced in evidence without objection. The facts with respect to the crime are set forth in some detail in *People* v. *Duncan, ante,* * p. —— [—— P.2d ——], and will not be repeated here.

Defendant, who was 25 years of age at the time of the trial, had a long history of antisocial behavior. He had used narcotics since early adolescence. He committed numerous burglaries and was incarcerated in Los Prietos Boys Camp where he was a disciplinary problem and attempted to escape. After he was released he entered the army, and was frequently absent without leave. He was court-martialed, sentenced to the stockade, escaped, and, when caught was taken under armed guard to Korea. While overseas he was court-martialed for giving heroin injections to soldiers and was dishonorably discharged. A psychiatrist Dr. David R. M. Harvey, testified that defendant is incapable of learning, is dangerous to society, and, although legally sane, is a "sociopathic personality," which was defined as an individual who is always in trouble, profiting neither from experience nor punishment and maintaining no real loyalties to any person, group, or code.

---

[1] Separate trials were given to Mrs. Duncan and Moya and their punishment was also fixed at death. (See *People* v. *Duncan, ante,* * p. —— [—— P.2d]; *People* v. *Moya, ante,* † p. —— [—— P.2d ——].)

† Advance Report Citation: *Ante,* p. 822.

* Advance Report Citation: *Ante,* p. 807.

[1] The principal question presented on this appeal is whether the court committed reversible error in admitting evidence concerning the parole record of Moya. An officer of the California Adult Authority, called as a witness for the defense, testified that first degree murderers are better parole risks than other prisoners. On cross-examination [fol. 311] the witness was permitted over objection to testify that for a prior offense (possession of narcotics) Moya had been sentenced to prison for a maximum of 10 years and was paroled in one year. Moya's prior offense was not first degree murder, and it was improper to admit this testimony (*People* v. *Purvis*, 52 Cal.2d 871, 885-887 [346 P.2d 22].) However, we have concluded, after an examination of the entire record, that the judgment must be affirmed since it does not seem reasonably probable that in the absence of the error a result more favorable to defendant would have been reached by the jury. (Cal. Const., art. VI, § 4½.)

The judgment and order denying the motion for a new trial are affirmed.

Traynor, J.; Schauer, J., Spence, J., McComb, J., Peters, J. and White J. concurred.

[fol. 312] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1959

Nos. 1071 Misc., 1074 Misc., and 1075 Misc.

AUGUSTINE BALDONADO, Petitioner,

vs.

CALIFORNIA

LUIS ESTRADA MOYA, Petitioner,

vs.

CALIFORNIA; and

ELIZABETH ANN DUNCAN, Petitioner,

vs.

CALIFORNIA

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR CERTIORARI—June 27, 1960

On Petitions for Writs of Certiorari to the Supreme Court of the State of California.

On Consideration of the motions for leave to proceed in forma pauperis and of the petitions for writs of certiorari, it is ordered by this Court that the motions to proceed in forma pauperis be, and the same are hereby, granted; and that the petitions for writs of certiorari be, and the same are hereby, granted limited to the following questions:

1. Was petitioner's right to the trial guaranteed by the Due Process Clause of the XIV Amendment violated in view of the conduct of the District Attorney, the resulting publicity, and the other circumstances under which the trial was held?

2. Was there a violation of petitioner's right to a fair trial, as guaranteed by the Due Process Clause of the XIV Amendment of the Constitution of the United States of America, where in a trial of a capital offense by jury, the trial court permitted to remain in the jury box and sit in judgment, three jurors who had entered the jury box with

[fol. 318] fixed opinion as to petitioner's guilt, and retained such opinions while being examined on voir dire?

The cases are transferred to the appellate docket as Nos. 1045, 1046, and 1047 and are consolidated with a total of three hours for oral argument.

The orders of Mr. Justice Douglas of June 10, 1960, staying the execution of the death sentences are continued pending the issuance of the mandates of this Court.

And it is further ordered that the duly certified copy of the transcripts of the proceedings below which accompanied the petitions shall be treated as though filed in response to such writs.

June 27, 1960.

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FILE COPY

PETITION NOT PRINTED

Office-Supreme Court, U.S.
FILED
MAR 18 1961
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 185

AUGUSTINE BALDONADO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 185

AUGUSTINE BALDONADO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF FOR PETITIONER

The Opinion Below

The Opinion of the California Supreme Court is reported at 53 Cal. 2d 824, 3 Cal. Rptr. 363, 350 P. 2d 115 (R. 205).

Jurisdiction

The Opinion of the California Supreme Court was entered on March 11, 1960 (R. 205). The petition for writ of certiorari was filed on June 7, 1960, and was granted on June 27, 1960 (R. 208; 363 U.S. 840).

Question Presented

Was petitioner's right to the trial guaranteed by the Due Process Clause of the XIV Amendment violated in view of the conduct of the District Attorney, the resulting publicity, and the other circumstances under which the trial was held?[1]

Statutes Involved

The Constitution of the United States provides in pertinent part as follows:

Amendment XIV, Section 1:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . "

Section 190, Penal Code of the State of California, in part provides:

> "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1, . . . "

Section 190.1, Penal Code of the State of California, in part provides:

> "The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life, shall first be determined, without a finding as to penalty. If such

---

[1] *Baldonado* v. *California*, 363 U.S. 840 (1960); R. 208. The second question certified for review does not involve this petitioner.

person has been found guilty of an offense punishable by life imprisonment or death and has been found sane on any plea of not guilty by reason of insanity there shall thereupon be further proceedings on the issue of penalty and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant. . .

" . . . If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. . . . "

Section 1033, Penal Code of the State of California, in part provides:

"A criminal action pending in a superior court may be removed from the court in which it is pending on application of the defendant, on the ground that a fair and impartial trial cannot be had in the county. . . . "

Section 1239(b), Penal Code of the State of California, provides:

"(b) When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel."

Statement of the Case

In the middle of December of 1958, Petitioner; Luis Moya and Elizabeth Duncan were arrested in connection with the disappearance of Olga Duncan, and were subsequently indicted for her murder (R. 2).

The bizarre context in which these events occurred caused widespread newspaper publicity and excited enormous public interest (R. 40). The distillation of the newspaper accounts at the time of these arrests created these impressions and suspicions: Mrs. Duncan was deeply attached to her son, Frank Duncan, and had opposed her son's marriage on June 20, 1958 to Olga. On August 7, 1958, unknown to her son, she secured a fraudulent annulment of the marriage by impersonating Olga, and she agreed to pay Baldonado and Moya $6,000 to kill Olga.

Superimposed on this account were certain extraordinary statements of the District Attorney. On December 22, 1958, he issued a statement advocating the death penalty for petitioner and the others which was published on the front page of the community's leading newspaper under the heading "D.A. Urges Death Term in Killings" as follows:

> "The brutal, calculated, revolting killing for hire of Olga Duncan is one of a number of horrible crimes which have recently been committed in California. I simply cannot understand how some of our leaders, in the face of these events, can seriously contend that the death penalty is not appropriate punishment for the perpetrators of such a crime.
>
> "Many persons contend that the death penalty does not deter murder. Frankly, I am sick of this illogical argument. Of course penalties do not completely deter crimes. Jail sentences do not completely deter drunken

drivers, burglars, robbers or any other criminals and death penalties do not completely deter murderers. But that is no reason to dispense with penalties.

"Retaliation is a basic instinct of the human race. In civilized societies, the government takes over from the individual the job of retaliating against a wrongdoer. From biblical times, a life for a life has been recognized as just and fair.

"The alternative in California, a life sentence which permits a prisoner to be paroled in seven years, simply is insufficient retaliation. I hope the people of this state rise up against the propaganda drive[1] that has flooded us lately about the so-called evils of capital punishment. They must demand that California retain the death penalty to deal with situations such as the Duncan case" (R. 9; Appendix A).

In an affidavit opposing a change of venue the District Attorney purported to justify this statement by the following logic:

"My statement that the death penalty is appropriate for the perpetrators of the murder of Olga Duncan cannot prejudice the defendants. The law of California is such that the defendants are guaranteed a fair trial. If, after such a trial, the defendants are found not to have perpetrated the crime, they obviously will not be prejudiced and my statement would be inapplicable to them. If, on the other hand, they are found guilty of first degree murder, then the statement will apply to them. The fact that it was made before the taking of testimony before the trial jury is of no consequence. In any case involving murder where the prosecutor seeks the death penalty, the fact that he will do so is always disclosed before the trial jury is selected by reason of the questions asked of prospective jurors as to the entertainment of such

conscientious opinions as would preclude their finding the defendant guilty and imposing the death penalty. Consequently, whether prospective jurors know that I will seek the death penalty as the appropriate punishment from reading the newspapers or from hearing me say so in court is immaterial" (R. 14-15).

Petitioner was indicted by the Grand Jury of Ventura County on December 26, 1958 (R. 2).

On December 30, 1958 a story appeared in the same newspaper purporting to be an interview with the District Attorney in which he stated why the death penalty was proper punishment for this crime. Among other things the District Attorney said:

> "When you do catch 'em, and when you do convict 'em, what are you going to do with them . . . rehabilitate 'em?"
>
> According to District Attorney Roy A. Gustafson, the chances of rehabilitating the three persons arraigned today on charges of murder-for-hire are "awfully slim . . . and I don't want to take that kind of chance."
>
> That is one of the reasons why he is going to ask for the death penalty against Mrs. Elizabeth Duncan, and her two accused accomplices—Augustine Baldonado and Luis Moya—in the hired slaying of nurse Olga Duncan.
>
> Gustafson repeated his plans yesterday, and added that he expected the case would probably be mentioned when the new legislative campaign opens this year to do away with the death penalty.
>
> "The most pertinent point in the death penalty is retribution. Anyone who says we must get away from the 'barbaric thought' of retribution is not being realistic.

* * * * *

"We deal in a punishment system with retribution. Society takes over for the individual who has been wronged, and it punishes the wrongdoer. Many crimes can't have retribution: rape, for instance. So we incarcerate, or fine or execute."

Retribution, he says, is one of four major points in any punishment. Another is deterrence, a third is rehabilitation. Rehabilitation's statistics are "pretty sad," he says. And any alternative to capital punishment usually involves life sentences without pardon or parole. A lifer without hope of ever leaving prison "has no hope and becomes a vegetable. Or worse, as we'll show you later."

But as far as rehabilitation goes, Moya was paroled a year ago after serving a year out of a 1-to-10-year term for marijuana possession. Gustafson says Moya was using marijuana when he was arrested in the Duncan murder case.

By the state's own figures, 48.8 percent of parolees wound up back in prison or jail within four years of being paroled. In the case of women, the rate was 57.5 percent. And the rate is going up, not down, he points out.

He commented that the possibility of putting California's third woman in the gas chamber does not present him with any qualms.

"This is appropriate punishment," he said, paraphrasing the judge in the Harvey Glatman case. And he adds: "What are you going to do, rehabilitate 'em?" [2]

---

[2] See Appendix B, containing the complete newspaper story from which the foregoing was taken. See R. 44-45 and page 6 of Exhibit 8 thereto. In response to the petitioner's citation of this newspaper story in connection with a motion to change venue, the District Attorney made an affidavit denying that he made any statement to the effect that Moya was using marijuana when he was arrested (R. 16). This affidavit made no other denials regarding the substance of the purported interview.

The petitioner filed an application on January 8, 1959 for a change of venue. On January 15, 1959, the motion was denied (R. 6, 22). On February 16, 1959 the Duncan trial commenced (R. 154, Duncan Transcript of Record), and on March 16, 1959, the jury found Mrs. Duncan guilty of murder in the first degree (R. 64). On March 20, 1959 the jury sentenced Mrs. Duncan to death (R. 75).

In the March 21, 1959 issue of the Ventura County Star-Free Press, the District Attorney is reported to have hailed the Duncan death verdict by stating that it should have the effect of heading off moves to abolish the death penalty in California (R. 68, Exh. A-36, Moya).

The heavy press coverage accorded to a sensational murder case in the trial of Mrs. Duncan was intensified by camera coverage of the trial proceedings.

On April 6, 1959, after a plea of guilty to murder in the first degree, a jury was impanelled for the sole purpose of determining the petitioner's punishment, and thereafter the jury fixed his penalty at death (R. 23, 28). On April 14, 1959 an order was made denying a motion for a new trial and the petitioner was sentenced to death (R. 28-29). Thereupon an appeal was undertaken automatically to the California Supreme Court pursuant to California Penal Code Section 1239(b). The judgment of the trial court was affirmed on March 11, 1960.

SUMMARY OF ARGUMENT

Under California law petitioner was entitled to a jury trial, the sole issue of which was to determine his penalty for the crime of first degree murder. Prior to the commencement of this trial, the District Attorney made vigorous and extensive arguments for imposition of the death penalty which were intentionally given to the press and widely disseminated. Such acts of the District Attorney amounted to misconduct and constituted a deliberate effort to interfere with petitioner's penalty hearing. Seeking to correct this wrong, petitioner asked for a change of venue. His request was denied. Due process requires that in this type of situation the state provide a "corrective process".[3]

As a result of the above circumstances petitioner was deprived of his right to a fair trial, and hence the judgment deprives him of life without due process of law, as guaranteed by the XIVth Amendment to the Constitution of the United States; the judgment sentencing him to death ought to be reversed with instructions that the penalty issue be retried in a county in California less susceptible to the District Attorney's prejudicial statements.

---

[3] *Frank v. Mangum*, 237 U.S. 309, 335.

ARGUMENT

I

Introduction

> "Henceforth there shall be in every countie a sober, discreet and religious person appointed by the countie court, to be atturney to the Queen to prosecute and implead in the law all criminals and to doe all other things necessary or convenient as an atturney to suppress vice and immoralitie." [1]
>
> —1704 Connecticut Law

This hearing concerns one of the most urgent and difficult problems in the administration of criminal justice: how to secure to the accused his right to a fair trial after the State has disseminated prejudicial statements to the public by means of the press and other mass media of communications, and ultimately how to prevent public prosecutors from trying their cases outside of the courtroom.

---

[1] This is the first law in any of the American colonies establishing the office of public prosecutor, and is quoted in National Commission on Law Observance and Enforcement, Report on Prosecution, April 22, 1931, No. 4, page 7 (Wickersham Report). At common law, crimes were prosecuted privately by the aggrieved complainant. Lord Hale urged the replacement of private prosecutors by public prosecutors in order to do away with the evil practices of private criminal prosecution (*ibid.*) p. 6.

For a modern view as to the duties of the prosecutor, see *Re Sawyer*, 360 U.S. 622, 666.

II

Published Statements of the District Attorney Arguing That the Death Penalty Should Be Imposed on Petitioner Represents the Deliberate Act of the State Calculated to Interfere with Orderly Procedure and Deprived the Petitioner of a Fair Penalty Trial.

A.

In California an accused who pleads guilty to murder in the first degree, a crime punishable by life imprisonment or death, is entitled to a jury trial on the sole issue of whether his punishment shall be life imprisonment or death [§§190, 190.1, California Penal Code]. The petitioner pleaded guilty to murder in the first degree. He was accorded a jury penalty trial and was sentenced to death.

The petitioner's right to a fair trial was invaded by the District Attorney's newspaper campaign. This Court has long recognized that due process may be denied where a trial takes place in a prejudiced atmosphere:

> "We, of course, agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the state, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state deprives the accused of his life or liberty without due process of law" [*Frank* v. *Mangum*, 237 U.S. 309 at 335].

In *Moore* v. *Dempsey*, 261 U.S. 86, this Court in recognizing that an inflamed atmosphere might be incompatible with due process, after citing *Frank* with approval stated:

> "... But if the case is that the whole proceeding is a mask,—that counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion, and that the state courts failed to correct the wrong,—neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights" [at 91].

Petitioner does not claim that his penalty trial was "mob-dominated" in the sense of *Frank* and *Moore;* however, he does urge that the extra-judicial conduct of the District Attorney was an intentional interference with petitioner's right to a fair trial and that no "corrective process", such as change of venue, was provided. The principle of the cited cases is that extra-judicial factors tending to compromise the inviolability of the courtroom may defeat due process, and this principle is not weakened because it is the state, rather than the mob, which inspires the interference.

The practice of trying cases in the mass media is, in a sense, more appalling than certain improprieties committed by the police. See, e.g., *Rochin* v. *California*, 342 U.S. 165. This because the police, ostensibly, have a valid objective, the discovery of evidence; it is the method of the police and not the objective which sometimes offends due process. No proper objective within the purview of a public prosecutor is remotely served by trying a case outside the courtroom. Moreover, the prosecutor is a

skilled lawyer and officer of the court who, therefore, has knowledge and duties patently incompatible with such conduct. A reversal in this case would effectively communicate this point to the public prosecutors.[5] Petitioner is not suggesting that this court discipline prosecutors for misconduct by reversing judgments of conviction. Rather, he suggests such treatment for its therapeutic value in this instance and its preventive effects in future cases.

B.

This court has spoken of standards of conduct applicable to prosecutors: "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring a just one." *Berger* v. *U.S.*, 295 U.S. 78, 88. These standards of conduct have become almost truistic.[6]

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[5] In reversing a conviction in *People* v. *Wilkes*, 44 Cal. 2d 679, the court stated:

"It was error for the prosecution to comment on the failure of Mrs. Wilkes to testify. (Citations.) Such error has repeatedly been denounced but held not to have been prejudicial in the circumstances of the particular cases in which it has occurred. Because of such repeated holdings it appears from the brief of the People, prosecuting officials have come to the belief that erroneous conduct in this regard is, as a matter of law, not cause for reversal. The conduct here, as in previous cases where it has been rebuked but held not prejudicial, was manifestly deliberate. *Regrettably, the circumstances make it apparent that we must recognize and deal with the fact that such conduct will not be discontinued as long as it is merely rebuked. . . .*" (Emphasis added.)

[6] "The prosecutor in a rural area should avoid appearing to be an overzealous crusader." (Frederick B. Bryant, "The Rural Prosecutor", in pamphlet, "Public Prosecutors", Practising Law Institute, 1955, p. 1.) "Because of the key position which the prosecutor holds in controlling the atmosphere of a criminal trial, he should abstain from overemphasizing the sordid aspects or criminal news. . . . The prosecutor who scrupulously practices law instead of attempting to play pol-

This court has dealt with inflammatory conduct on the part of newspapers and governmental officers. In *Shepherd* v. *Florida*, 341 U.S. 50, newspapers published as fact, and attributed the information to the sheriff, that the defendants had confessed. Justice Jackson, concurring, stated:

> " . . . If the prosecutor in the court room had told the jury that the accused had confessed but did not offer to prove the confession, the court would undoubtedly have declared a mistrial and cited that attorney for contempt" [pp. 51-52].

Likewise, in the case at bar, if the prosecutor had made his statements before the jury and prior to the normal time for argument, the trial court would have taken similar action. The difficulty with this type of case is that trial courts have become accustomed to trial by newspaper and have become inured to such "procedure".[7] Although our

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ities will not be tempted to shape up his case for newspaper headlines and for justice afterwards. . . . Before and during the trial of a case, the prosecutor should avoid making premature disclosures which may have a bearing on the sentiment of the public or the reasoning of the jurors." (Wendell Berge, "The Prosecutor and Crime Publicity", 29 A.B.A.J. 63 [1943].)

[7] Justice Frankfurter dissenting in *Stroble* v. *California*, 343 U.S. 181, observed:

> "And so I cannot agree to uphold a conviction which affirmatively treats newspaper participation instigated by the prosecutor as part of 'the traditional concept of the "American way of the conduct of a trial." ' Such passion as the newspapers stirred in this case can be explained (apart from mere commercial exploitation of revolting crime) only as want of confidence in the orderly course of justice. To allow such use of the press by the prosecution as the California court here left undisciplined, implies either that the ascertainment of guilt cannot be left to the established processes of law or impatience with those calmer aspects of the judicial process which may not satisfy the natural, primitive, popular revulsion against horrible crime but do vindicate the sober second thoughts of a community" (pp. 201, 202).

trial courts function in the twentieth century, their cognition of this problem is obsolete. The lower courts must realize that old process[*] is not necessarily due process, and just as ancient and crude methods of trial have had an historical refinement, so must the law extract and eliminate the impurity of trial by newspaper." Again, Justice Jackson recognized the point in *Shepherd*:

> " . . . But prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated" (p. 51).

The prejudicial influence in petitioner's case was that the District Attorney carried on a brainwashing campaign to condition the local populace to his persuasion. The District Attorney propagandized on the main subject matter of this petitioner's *jury trial*. It is difficult to imagine statements which could more effectively infect a trial, the sole issue of which was to fix the defendant's penalty. Petitioner could not have had a fair penalty trial in Ventura County after the District Attorney's Madison Avenue packaging of the case.

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[*] Judge Walter W. Shaeffer recently wrote:

> "Due process cannot be confined to a particular set of existing procedures because due process speaks for the future as well as the present, and at any given time includes those procedures that are fair and feasible in the light of the then existing values and capabilities. Some features of present procedures are now accepted by force of custom, or because no practical way has been found to improve them. Technological change or a refinement in our sense of justice may make their retention intolerable" (70 Harv. Law Rev. 1 at p. 6).

C.

In *Stroble* v. *California*, 343 U.S. 181, this Court recognized that newspapers could so inflame and prejudice the atmosphere of a community as to deny due process. While *Stroble* affirmed the conviction under review, it is not dispositive of this case as is demonstrated by the comparison which follows.

In *Stroble* the acts of the District Attorney were less aggravated. Consequently this court merely deprecated his conduct in releasing to the press a confession which could have been printed four days later as a result of being read into the record at the preliminary hearing [343 U.S. at 193]. In this case the District Attorney carried out a deliberate press campaign to obtain the death penalty [see Appendices A and B].

Moreover, in *Stroble* this Court deemed it significant that the defendant did not seek a change of venue [343 U.S. at 194]. In *United States* v. *Handy*, 351 U.S. 454, this Court again considered it significant that the defendant in a capital case who raised the issue of trial in a prejudiced atmosphere had not sought to change the venue of that trial. In this case a motion for change of venue was seasonably filed and denied. The basis for the motion was that a fair and impartial trial could not be obtained in Ventura County because of the prejudicial atmosphere engendered by the published statements of the District Attorney.

And in *Stroble* it was noted that public passion had had an opportunity to subside between confession and trial [343 U.S. at 192-193]. Publicity concerning the Duncan murder reached its apogee only two weeks before the petitioner's trial commenced on April 6, 1959, for Mrs. Duncan's trial spanned the period between February 16, 1959

and March 20, 1959, and the accounts of her trial were front page copy in the local press, which extended its coverage by photographing the proceedings in derogation of Canon 35 of the Canons of Judicial Ethics. On March 21, 1959 the District Attorney was reported in the local press to have said that Mrs. Duncan's death verdict should head off moves to abolish the death penalty in California (R. 68, Exh. A-36, Moya).

The foregoing discussion highlights the two major distinctions between *Stroble* and this case. First, in petitioner's case the most harmful publicity resulted from the deliberate and intentional activities of the prosecution, while *Stroble* dealt primarily with newspaper accounts *per se*.[8a] The importance of this distinction is probably embedded in the difficult question of fair trial versus free press, because though *Stroble* was not a newspaper contempt case, a reversal might have served as an indirect restraining influence on the press. The thrust of the case at bar is directed primarily against the activities of the prosecutor as distinguished from the press.

The other important distinction is that petitioner vigorously sought a change of venue. In *Stroble* this court stated:

> " . . . But, in an effort to determine whether there was public hysteria or widespread community prejudice against petitioner at the time of his trial, we think it significant that two deputy public defenders who were vigorous in petitioner's defense throughout the trial, saw no occasion to seek a transfer of the

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[8a] " . . . [W]e are . . . faced . . . with the question whether newspaper accounts aroused such prejudice in the community that petitioner's trial was 'fatally infected' . . . " (*Stroble*, at p. 191.)

action to another county on the ground that prejudicial newspaper accounts had made it impossible for petitioner to obtain a fair trial in the Superior Court of Los Angeles County" [p. 194].

D.

Due process should not saddle the defendant with the difficult burden of proving prejudice. The opinion below requires petitioner to demonstrate he was prejudiced by the state's wrongful conduct, that is, the conduct of the District Attorney. The petitioner is required to show that a juror was influenced by the prejudicial statements. Note, the demand for the showing comes from the wrongful actor. The state acts in a way calculated to deprive the defendant of a fair hearing, and then places upon him the burden of proving injury. Of course, this proof requirement is consistent with basic notions of remedies underlying our law, i.e., a person seeking legal redress usually must prove that he has been damaged. The problem with transporting such a notion to this area is the difficulty of proof. Anyone who has observed a *voir dire* proceeding is struck by the crude, hit or miss, hunch method of getting rid of an unfavorable (i.e., "prejudiced") prospective juror. It is doubtful whether the use of professional psychometric personnel with their batteries of tests would provide any more certitude. Nevertheless, the state after engaging in acts presumably creating prejudice demands that the defendant, who is typically indigent, clearly demonstrate he has been prejudiced. Considering the difficulty of such proof the state has everything to gain, and little to lose, by selling its case in the mass media.

Accordingly, under this approach, the petitioner is required to produce a juror who has sufficient insight to recognize subconscious bias, or mistakenly believes he

is biased, or dishonestly says he is biased, or dishonestly conceals his bias,—an intolerable burden with which to saddle the aggrieved persons. That even judges may have difficulty in recognizing their own bias has been noted:

> " . . . No judge fit to be one is likely to be influenced consciously except by what he sees and hears in court and by what is judicially appropriate for his deliberations. However, judges are also human, and we know better than did our forebears how powerful is the pull of the unconscious and how treacherous the rational process. . . . " (Concurring opinion in *Pennekamp* v. *Florida*, 328 U.S. 331, 357.)

The harmful effect of trial by newspaper and other mass communication media has been the subject of scientific study, and there is little doubt that such communications can have a harmful effect on a trial.[9] Experiments show that statements attributable to a public figure are more readily acceptable and have more impact than statements from obscure persons.[10] Obviously, this finding is applicable to a District Attorney in his own county. Petitioner has prepared as Appendix C a survey of material dealing with this subject.

E.

Although petitioner stresses the effect of newspaper publicity on his right to a fair trial, this case does not involve a collision of fair trial and free press principles.

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[9] Murphy and Newcomb, *Experimental Social Psychology* (1937), pp. 961, 967 and 969; Cantrill and Allport, *Psychology of Radio*, pp. 177-180; Doob, *Public Opinion and Propaganda* (1945), p. 337. A comprehensive discussion of the entire problem of press and radio influence may be found in 63 Harv. L. Rev. 840. See, also, a recent note in 34 N.Y. Univ. L. Rev. 1278 (November 1959).

[10] Murphy and Newcomb, *op. cit. supra*, note 9, at 970.

However, the cases decided involving freedom of press and fair trial are, nevertheless, instructive. See, e.g., *Craig* v. *Harney*, 331 U.S. 367; *Pennekamp* v. *Florida*, 328 U.S. 331; *Bridges* v. *California*, 314 U.S. 252. These cases recognize that newspaper activity can affect the administration of justice.[11] The majority in *Bridges, supra*, although finding that the administration of justice had not been compromised, stated:

> "The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."

The English experience is also instructive.[12] An English writer has formulated the problem in the following manner:

> "Perhaps no feature of modern journalism has been so severely criticized as the attempt to try cases in the press before they have been heard in the courts. In their desire to furnish their readers with the latest startling news, newspapers, unless properly controlled by the law, may publish incorrect statements of fact or express biased opinions which will hinder a fair trial. This is particularly true in those cases . . . which are to be heard by a jury, for under modern conditions, every juryman reads a news-

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[11] Cf. *United States* v. *Powell*, USDC ND Cal., 171 F. Supp. 202.

[12] See appendix to *State of Maryland* v. *Baltimore Radio Show*, 338 U.S. 912.

paper, and it is not unlikely that he will be influenced by what it says. The English courts have, therefore, taken a strong view in an attempt, which has proven remarkably successful, to put down the evil."[13]

Lord Ellenborough in an early case observed:

> "If anything is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. Is it possible they should do so, after having read for weeks and months before *ex parte* statements of the evidence against the accused, which the latter had no opportunity to disprove or to controvert" (*Rex* v. *Fisher*, 11 RR. 799 [K.B. 1811]).

In the light of modern psychology, Lord Ellenborough's ideal juror, having a mind "pure and unprejudiced", may be an illusory objective. Yet, granting the jury system, should not the courts bend every effort toward seeking this lofty ideal?

III

The Failure of the State to Supply a "Corrective Process" Constituted a Denial of Due Process.

After the District Attorney's statements, it was incumbent on the state to apply some "corrective process" (*Frank* v. *Mangum*, 237 U.S. 309). The accepted and available process was to change the venue of the trial. This Court in *Stroble* v. *California*, 343 U.S. 181, impliedly recognized that such procedure would be appropriate in cases of this nature.

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[13] Goodhart Newspapers and Contempt of Court in English Law, 48 Harv. L. Rev. 885, at p. 885.

Since *Stroble,* several cases have arisen in the courts dealing with community prejudice. These cases suggest some kind of relief should be given to ameliorate the prejudice: either change of venue or an appropriate postponement of trial. In *Delaney* v. *United States,* 199 F. 2d 107 (C.A. 1, 1952), after indictment and before trial, a Senate Committee conducted hearings concerning conduct of the accused which received prominent attention in the press. The accused moved for a continuance of the trial to allow the prejudice to subside and his motion was denied. In reversing, a unanimous First Circuit, through Judge Magruder, stated:

> " . . . [T]he strongest point . . . relied upon by appellant, is that the trial judge committed error in not granting a continuance of the trial for a longer period, until such time as it could be estimated with greater assurance that the prejudicial effect of the aforesaid publicity . . . had so far worn off that the trial could proceed free of the enveloping hostile atmosphere and public preconception of guilt prevalent on January 3, 1952, when appellant was brought to trial" (p. 112).

The appellate court observed that the trial judge had conscientiously tried to minimize the prejudicial effect of the publicity by cautionary remarks and instructions, but discounts the prophylactic effect:

> " . . . But as stated by Mr. Justice Jackson, concurring, in *Krulewitch* v. *United States,* 1949, 336 U.S. 440, 453, 69 S. Ct. 716, 723, 93 L.Ed. 790: 'The naive assumption that prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers know to be unmitigated fiction' . . . " (*ibid.*).

Here the petitioner's principal effort to mitigate the prejudicial atmosphere was to seek removal rather than

continuance, but the same fundamental question is involved.

In *Palakiko* v. *Harper*, 209 F. 2d 75 (C.A. 9), the court in affirming a conviction where defendant charged newspapers had created a prejudicial atmosphere, the court gave great weight to defendants' failure to ask for change of venue.

In *United States* v. *Rosenberg*, 200 F. 2d 666, 670 (C.A. 2), there was prejudicial newspaper publicity *during* the trial and defendants elected not to ask for a mistrial. Again, as in most of these cases, the court laid great stress on the fact that defendants failed to ask for some kind of relief from the prejudicial effect.

Recently a member of this court enunciated a view in accordance with the preceding analysis. See Douglas, *The Public Trial and the Free Press*, 46 A.B.A.J. 840, 841:

> "At other times the papers may so beat the drums of prejudice and passion as to make it doubtful whether a trial in the local courthouse can be fair to a particular defendant. See *Shepherd* v. *Florida*, 341 U.S. 50; *Stroble* v. *California*, 343 U.S. 181, 191-195. Local feelings may run so high as to necessitate a change in venue or a continuance to allow emotions to subside.
>
> "The point is that our remedy for excessive comment by the press is not the punishment of editors, but the granting of new trials, changes in venue, or continuances to parties who are prejudiced."

Conclusion

If this court reverses the death penalty judgment as petitioner requests, then the case will be returned to the California courts for a penalty hearing in a different county, the sole issue of which will be whether petitioner's penalty be fixed at life imprisonment or death.

It is respectfully submitted that the judgment below be reversed.

Respectfully submitted,

A. L. Wirin
John R. Danch
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Gerald L. Rosen
Attorneys for Petitioner.

THE WEATHER
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OLGA'S BODY FOUND IN COUN NURSE WAS BEATEN, STRANG

D.A. Urges Death Term In Killings

DISTRICT Attorney Roy Gustafson today saw the Duncan murder as reason for continuation of California's death penalty. He issued the following statement:

"The brutal, calculated, revolting killing for hire of Olga Duncan is one of a number of horrible crimes which have recently been committed in California. I simply can not understand how some of our leaders, in the face of these events, can seriously contend that the death penalty is not appropriate pun-

Suspect Murder In Casit

By JOE PA

GRAND jury indictments Mrs. Elizabeth Duncan, 26, and Luis E. Moya, 19, i Duncan, 30-year-old Santa pectant mother whose batt terday on Casitas Pass.

District Attorney Roy present the case to the g indictments on charges of

The body was found yes low grave 20 feet off Casitas northwest of Coyote creek. Ba his part in the crime he said

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IN COUNTY; STRANGLED

Suspect Admits Murder for Hire In Casitas Pass

By JOE PAUL, JR.

GRAND jury indictments will be sought against Mrs. Elizabeth Duncan, 54, Augustine Baldonado, 26, and Luis E. Moya, 19, in the murder of Mrs. Olga Duncan, 30-year-old Santa Barbara nurse and expectant mother whose battered body was found yesterday on Casitas Pass.

District Attorney Roy A. Gustafson said he will present the case to the grand jury Friday, seeking indictments on charges of murder.

The body was found yesterday afternoon in a shallow grave 20 feet off Casitas pass highway about five miles northwest of Coyote creek. Baldonado, who has confessed to his part in the crime he said Mrs. Duncan hired him to do with Moya, led officers to the spot.

The woman had been pistol-whipped, beaten repeatedly with a wrench and strangled.

It was not immediately determined whether the pretty Canadian nurse was dead when she was buried. An autopsy was being performed this morning to determine the cause of death.

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NURSE'S BODY FOUND NEAR CASITAS PASS

(Continued from Page 1)

and selecting a spot to dispose of the body.

Late on the night of Nov. 1., probably around midnight, they put their plan into operation. Moya was to go to the apartment of Olga Duncan while Baldonado stayed in the car. Moya was to tell her that his friend in the car needed help.

Baldonado told Higgins that he was lying down on the seat of the car when Moya came back to the car with the nurse. She was in a night robe.

As she leaned forward to look at Baldonado, he told the sheriff's investigator, Moya struck her over the head with the pistol butt.

Olga fought back, Baldonado said, and he tried to hold her while Moya continued to strike her with the gun. They pulled her into the car and kept hitting her until she was quiet, he said.

They drove out of Santa Barbara to Carpinteria, turned off on the Casitas pass road and continued into Ventura county.

Olga regained consciousness and began to struggle again as they carried her down an embankment to a spot near a highway drain culvert about 20 feet below the roadway. Baldonado said he strangled her while Moya began to scoop out a shallow hole in the soft silt at the edge of the drainage ditch with his hands.

Baldonado said he had trouble holding her and that Moya grabbed her and strangled her while he dug. "She got quiet and we figured she was dead," Baldonado said, "so we put her in the hole and covered her up."

The pair returned to Santa Barbara and after a couple of days Baldonado said he came to Ventura county.

KIDNAP SUSPECTS

They were arrested in Santa Barbara on suspicion of kidnaping after the elder Mrs. Duncan was placed in custody in connection with obtaining a fraudulent annulment in Ventura. Baldonado was released on that charge by Santa Barbara authorities, however, and re-arrested by Henderson and Osborne for Ventura county on a charge of failure to provide for his wife.

Baldonado maintained that Mrs. Duncan had never paid him any money she had promised.

After his confession, which he one before he finally got the right one. When the shallow grave was found, Baldonado became frightened and said he did not want to stay there while the body was being removed. He was granted permission to be taken to a Catholic priest.

ANNULMENT DISCOVERED

The matter came to the attention of authorities in Ventura county when the fake annulment affair was discovered. This occurred on Nov. 20, three days after Olga disappeared from her apartment.

She was arrested Dec. 13. Mrs. Duncan maintained she knew nothing of Olga's disappearance although she admitted obtaining the fake annulment papers Aug. 7. She came to Ventura at that time with Ralph Winterstein, 26-year-old ex-convict still at large, and Mrs. Emma Shortt, a friend.

A warrant has been issued for Winterstein charging him with forgery and perjury.

Mrs. Shortt, questioned by authorities, provided them with some key information in the case and at her request is being secreted away somewhere in Ventura county.

When Mrs. Duncan appeared in Ventura municipal court last week, she was represented by her son. He said he had talked to his mother and was convinced either "put up or shut up" as far as his mother was concerned when he made a successful bid to have the bail reduced from $50,000 to $5,000.

(Yesterday, Gustafson said: "He asked us to put up or shut up. Well, we put up.")

Duncan said he still loved his wife and hoped she would return to him.

During the weekend, it was announced in Los Angeles that Mrs. Duncan has changed attorneys, her son obtaining the services of S. Ward Sullivan, noted criminal lawyer.

In Santa Barbara city jail, Moya denied charges, police said. He buried his face in his hands and muttered, "I don't see why he (Baldonado) would say I had anything to do with it."

In Benito, Manitoba, Canada, Olga's mother, Mrs. Jessie Kupczyk, was reported to have collapsed from shock and a heart attack when she learned that her daughter had been slain.

Elias Kupczyk, 61, Olga's father, refused comment on the brutal slaying. He said he

Mrs. Burnham was a member of the Legion of Mary.

Requiem mass will be celebrated at 9 a.m. tomorrow at Santa Clara church. Burial will be in Santa Clara cemetery under the direction of Reardon Brothers mortuary.

Citizens Arrest Nabs Suspect

A Long Beach resident pursued and placed a citizens arrest on a hit and run suspect early Saturday after the suspect's auto struck his car at Main and Evergreen streets, Ventura police reported.

Arrested on suspicion of hit and run and drunk driving was Gunzalo Rodarte, Jr., 21, of 121 W. McFarlane street, Ventura.

Rodarte reportedly failed to stop after his auto struck a car driven by Earl Dean Stone, Long Beach. Stone pursued Rodarte and managed to stop the suspect's vehicle when it drove into a dead-end alley in the 500 block on E. Main street, police said.

Roy Gustafson Explains Why He'll Ask Death Penalty for Duncan Murder Trio

By MARVIN SOSNA

"WHEN you do catch 'em, and when you do convict 'em, what are you going to do with them . . . rehabilitate 'em?"

According to District Attorney Roy A. Gustafson, the chances of rehabilitating the three persons arraigned today on charges of murder-for-hire are "awfully slim . . . and I don't want to take that kind of chance."

That is one of the reasons why he is going to ask for the death penalty against Mrs. Elizabeth Duncan, and her two accused accomplices — Augustine Baldenado and Luis Moya—in the hired slaying of nurse Olga Duncan.

Gustafson repeated his plans yesterday, and added that he expected the case would probably be mentioned when the new legislative campaign opens this year to do away with the death penalty.

Such a campaign is likely, he believes. The proponents of abolition stand a better chance than they did last time, when a compromise plan—authored by Gustafson—averted an open fight on dropping capital punishment entirely.

Abolitionists would have stood a better chance this time, Gustafson believes, because—though he says their arguments are no stronger than they were before—the makeup of the legislature this year is different.

He believes most of the Democrats in the legislature favor abolition, and he heads the list of Sacramento abolitionists with Gov.-elect Edmund G. (Pat) Brown.

Brown, whom Gustafson supported in his campaign, "says he would do away with capital punishment if he could," says the D.A. "I disagreed with him on that and he knows it. His Republican opponent said he would not do away with it."

Probably the No. 1 foe of the death penalty in the legislature, says Gustafson is Sen. Fred Farr (D-Monterey.

But he believes that the Duncan case and the torture-slayings attributed to confessed killer Harvey Glatman in San Diego county will deter a number.

Gustafson agrees only partially. "Sure, it deters the defendant himself from ever doing it again. But it does not deter everybody, because we still have murders going on.

"The most pertinent point in the death penalty is retribution. Anyone who says we must get away from the 'barbaric thought' of retribution is not being realistic.

"We don't measure a man's penalty by his actions, but by what those actions did. If you're driving a car and you're drunk, that's a misdemeanor. But if you injure someone, that's a different set of consequences, and so you're a felon.

"If you shoot at someone with the intent to kill, that's assault with a deadly weapon, because you didn't aim well enough and the bullet missed him. If you shoot him and hit him with the bullet, that's murder.

"We deal in a punishment system with retribution. Society takes over for the individual who has been wronged, and it punishes the wrongdoer. Many crimes can't have retribution: rape, for instance. So we incarcerate, or fine or execute."

Retribution, he says, is one of four major points in any punishment. Another is deterrence, a third is rehabilitation. Rehabilitation's statistics are "pretty sad," he says. And any alternative to capital punishment usually involves life sentences without pardon or parole. A lifer without hope of ever leaving prison "has no hope and becomes a vegetable. Or worse, as we'll show you later."

But as far as rehabilitation goes, Moya was paroled a year ago after serving a year out of a 1-to-10-year term for marijuana possession. Gustafson says Moya was using marijuana when he was arrested in the Duncan murder case.

By the state's own figures, 48.8 percent of parolees wound up back in prison or jail within four years of being paroled. In the case of women, the rate was 57.5 percent. And the rate is going up, not down, he points out.

Still, he says, "It's a goal worth pursuing. But I think you have to be choosy about the people you're willing to take chances on."

Fourth on Gustafson's list of points in punishment is protection of society. And, he says, "You can say a life term protects society outside of prison. But what does it do inside? Even those wardens who favor doing away with the death penalty still want to have it for in-prison killings. These people could kill guards and each other, and know that they have already had the worst possible penalty. And remember, there is always the chance that some one could let him out, or he could escape, or the law could be changed to let him go free."

The death penalty, he says, "will not deter all crime, but it will certainly keep murder to a minimum. Look what it did to kidnaping."

The Lindbergh law is a prime example, Gustafson says, of society solving a criminal problem. Prior to it, kidnaping had been a fairly common crime.

In order to solve a crime problem, says the D. A., you must have "certainty of apprehension, certainty of conviction, and certainty of adequate punishment. The Lindberg law saw to all three."

In that light, why would anyone commit murder? "They think they won't get caught," he answers. "Lots of them aren't caught. Lots of them think that even if they're caught and convicted, they won't be executed." He noted that state-wide, only 57 percent of those who contest criminal court cases are convicted.

He commented that the possibility of putting California's third woman in the gas chamber does not present him with any qualms.

"This is appropriate punishment," he said, paraphrasing the judge in the Harvey Glatman case. And he adds: "What are you going to do, rehabilitate 'em?"

APPENDIX C

(1)

Howland and Weiss, "The Influence of Source Credibility on Communication Effectiveness", in *Public Opinion and Propaganda* (The Dryden Press, 1954)

"An important but little studied factor in the effectiveness of competition is the attitude of the audience toward this communication. Indirect data on this problem came from studies of 'prestige' in which subjects are asked to indicate their agreement or disagreement with statements which are attributed to different individuals. The extent of agreement is usually higher when the statements are attributed to 'high prestige' sources."

(2)

Charles W. Smith, Jr., *Public Opinion in a Democracy* (Prentice-Hall, Inc., 1939)

"Public opinion, then, is not the sum total of the individual opinions of isolated men. It is made up of the opinions of men living an associational life and affected by their contact with one another. Common interest, common elements of environment and inheritance, similar sources of information, and discussion among individuals give it unity of force" (p. 17).

(3)

Weld, A Study of the Way in Which a Verdict Is Reached by a Jury, 53 American Journal of Psychology 518 (1940)

"We also found as Weld and Roff found [in 51 American Journal of Psychology 609 (1938)] that early in the [moot court civil] trial many jurors reached a fairly definite decision, and that thereafter the effect of the testimony was merely to charge their certainty. This hap-

pened with at least 25% of the jurors, half of whom were disposed in the one, and half in the other way. Even those who as the trial progressed developed an attitude of doubt were still inclined to favor the one side or the other and in the jury room did so. We found no juror who attempted to maintain an attitude of doubt on the theory that he should make no decision until he had heard all the evidence, but we can substantiate the earlier findings of the cautious juror, and of the juror who is easily swayed by the testimony. In addition we discovered jurors who were influenced in reaching their verdict less by the proof than by their notion of what under the circumstances seemed to them to be 'right' or just" (p. 535).

(4)

Levine and Murphy, "The Learning and Forgetting of Controversial Material", 38 Journal of Abnormal & Social Psychology 507 (1943)

"An individual notes and remembers material which supports his social attitudes better than material which conflicts with these attitudes" (p. 515).

(5)

LeViness, Crime News, 66 U.S.L. Rev. 370 (1932) quotes H. L. Mencken

"Journalistic codes of ethics are all moonshine."

(6)

David Ensor, *I Was a Public Prosecutor*, Robert Hale Ltd. (1958)

"There is one other problem which has caused me some considerable concern for many years and that is prejudice against an accused person as a result of press publicity arising from the committal proceedings. It is a problem which is as old as the hills but has been brought to the attention of the Public by the remarks of Mr. Justice Devlin in a recent case at the Old Bailey. There have been a number of sensational cases in the last thirty years to

my knowledge when, because of publicity, it was very difficult to ensure that the accused received a fair trial. In cases where some juicy evidence is given before the Magistrates and plastered all over the daily Press and then later excluded at the trial because it is inadmissible, the danger is very real. The worst case of this on record is, I believe, the 'Blazing Car' case and the trial of Arthur Rouse. There before the committing Justices exciting evidence was given of the accused's relations with numerous young women, his harem, as he so aptly called it, and lurid details were given of his various illegitimate children. All given in evidence because the prosecution believed it necessary to prove a motive for Rouse's disappearance and his subsequent actions. It may or may not have been necessary but it was certainly food for the newspapers and the gaping public and, incidentally, the jury yet to be chosen. Then at the trial it is not used, no doubt because that great and eminently fair prosecutor, then Mr. Norman Birkett, regarded it as unfair. By that time, of course, the damage was done and it is difficult to imagine just how a trial could be properly conducted under such conditions. In the case of Rouse I do not for a moment believe that there was or could be any question of his guilt, but that is beside the point. Any prejudice to an accused person must be avoided at all costs. It is very true to say that not only should justice be done but that it should manifestly appear to be done" (pp. 169-170).

(7)

"The Newspaper and Crime", Address by Stanley Walker, City Editor, New York Herald-Tribune, Printed in Attorney General's Conference on Crime, December 10-13, 1934, Washington, D.C.

"In general, however, I am all in favor of the merciless, complete printing of all the news of crime. In no other way can the public be shaken out of its natural lethargy" (p. 6).

"I believe it is better for the public to be fully informed, whether the facts are pleasant or shocking, than to remain ignorant" (p. 7).

(8)

"Why Print Crime News", Address by Paul Bellamy, Editor, Cleveland Plain Dealer, Printed in Attorney General's Conference on Crime, December 10-13, 1934, Washington, D.C.

"Again, the newspaper which is honestly endeavoring to clean up crime in its community will meet with the criticism that it is whipping up a public hysteria which makes it impossible for defense lawyers to obtain jurors of an open mind, inasmuch as jurors, after all, are a part of the community. Anyone with considerable experience in the newspaper business can probably remember cases when something like this happened, and it should not happen. On the other hand, I am forced to observe in this connection, as I did in the matter of the moronic youths who imitate criminals, that if it is so, I do not see much that can be done about it. There should certainly be no deliberate attempt to build up unfair psychology toward any given criminal, but I would defend as long as I had any breath, the obligation of a newspaper to build up the strongest possible psychology that it can against crime. Lawyers, alas, do not always conduct the defense of criminals in such a way as to convince the unprejudiced observer that their principal object is the attainment of justice. If a layman dare make an observation with regard to the case I should like to suggest that the method of jury selection permitted, if not made obligatory, under the laws of most of our states, is a travesty and a joke. Repeatedly I have seen lawyers proceed toward the selection of a jury with no other purpose in mind, so far as an outsider can determine, except to get just as dumb a jury as possible and a jury which can have the wool pulled over its eyes as easily as possible by rhetoric and passionate declamation. It has always seemed to me a particularly foolish thing to allow lawyers to eliminate from juries all persons who will admit that they have read any newspaper record concerning an important or sensational crime. At risk of being accused of making a sales talk for newspapers, I should like simply to observe that most people in this day and generation do read newspapers, and

those who do not read newspapers are for the most part more nearly analogous to the vegetable than to the animal kingdom. They are people who do not know what is going on, who have no opinion, no imagination, very little education, and for the most part are utterly incapable of analyzing any proposition requiring thought" (pp. 14-15).

(9)

Wendell Berge, "The Prosecutor and Crime Publicity", 29 A.B.A.J. 63 (1943)

"The prosecutor is not merely an advocate—he appears in Court 'clothed in official raiment' " (p. 64).

(10)

Statement of Judge of the Criminal Court of Baltimore City, Quoted in *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912

" . . . [B]ut Judges are supposed to be made of sterner stuff than to be influenced by irresponsible statements regarding pending cases. They are trained to put aside inadmissible evidence and while we, of course, recognize our limitations, I think that most Judges, at least, are fairly able to disregard improper influences which may have reached their attention.

"Now, what about the jury? In the first place, what is this jury that we are talking about? They are twelve men, or in most jurisdictions now, as in Maryland, men and women who are picked from all walks of life and who have the responsibility of hearing cases and determining, in this State at least, not only the facts but the law in the case. It may be unfortunate, perhaps, but certainly the fact is that the jury's verdict is final in most cases. There is the limited protection of the accused to apply for a new trial, but the Court of Appeals can not determine—review and determine—the propriety of the verdict reached by the jury either on the law or on the facts. Now this jury system is intended, and I think it works out that way, to bring to the trial of a case as one element, the public opinion in the community. It is true that the jury is sworn

to decide the case upon the evidence which it hears from the witness stand, but I think that no experienced lawyer would contend that a jury is not expected to bring to the consideration of its verdict the temperament of the community in which the members of the jury live. The jury is called upon to decide the facts as it hears them from the witness stand in the light of its past experience and, if you please, its past knowledge. True, attempts are made to get jurors who have not been touched with any previous influence in the case, but the safeguards that are provided for the realization of that ideal are all too limited" (pp. 913-914).

"Now, the Court can not help but feel that the broadcast referred to in these cases must have had an indelible effect upon the public mind and that that effect was one that was bound to follow the members of the panel into the jury room . . . " (p. 915).

"The suggestion was made here also, that the mischief could have been avoided by exercising the right of the Defense to examine, on their voir dire, all prospective jurors and then inquiring as to whether or not they had heard these broadcasts. Well, now, it hardly seems necessary for the Court to say to men who are experienced in the trial of jury cases, that every time Defense Counsel asked a prospective juror whether they had heard a radio broadcast to the effect that his client has confessed to this crime or that he has been guilty of similar crimes, he would by that act be driving just one more nail into James' coffin. We think, therefore, that remedy was useless" (p. 916).

(11)

Canon of Professional Ethics No. 20, American Bar Association

NEWSPAPER DISCUSSION OF PENDING LITIGATION

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of Justice. Generally they are to be condemned. If the

horrible crimes which have recently been committed in California. I simply can not understand how some of our leaders, in the face of these events, can seriously contend that the death penalty is not appropriate punishment for the perpetrators of such a crime.

"Many persons contend that the death penalty does not deter murder. Frankly, I am sick of this illogical argument. Of course penalties do not completely deter crimes. Jail sentences do not completely deter drunken drivers, burglars, robbers or any other criminals and death penalties do not completely deter murderers. But that is no reason to dispense with penalties.

"Retaliation is a basic instinct of the human race. In civilized societies, the government takes over from the individual the job of retaliating against a wrongdoer. From biblical times, a life for a life has been recognized as just and fair.

"The alternative in California, a life sentence which permits a prisoner to be paroled in seven years, simply is insufficient retaliation. I hope the people of this state rise up against the propaganda drive that has flooded us lately about the so-called evils of capital punishment. They must demand that California retain the death penalty to deal with situations such as the Duncan case."

SHALLOW, HAND-SCOOPED GRAVE — Sheriff's Detective Ray Higgins stands beside shallow Casitas pass grave that held body of pretty Canadian nurse Olga Duncan and her unborn child. Dotted line indicates grave. (Star-Free Press photo by Cliff Mallair, Jr.)

OLGA DUNCAN
Struggled for Life

MRS. ELIZABETH DUNCAN
Smiles When Told Body Found

District Attorney Roy A. Gustafson said he will present the case to the grand jury Friday, seeking indictments on charges of murder.

The body was found yesterday afternoon in a shallow grave 20 feet off Casitas pass highway about five miles northwest of Coyote creek. Baldonado, who has confessed to his part in the crime he said Mrs. Duncan hired him to do with Moya, led officers to the spot.

The woman had been pistol-whipped, beaten repeatedly with a wrench and strangled.

It was not immediately determined whether the pretty Canadian nurse was dead when she was buried. An autopsy was being performed this morning to determine the cause of death.

It was learned that she was lured to her death when she thought she was needed to help a man who was injured or ill. Moya is reported to have tricked her into thinking that "his friend in the car" needed help. Although seven months pregnant and said by her doctor to be in a state of near-shock from fear and worry, she put on a robe to see if she could give aid.

Officers said that when Mrs. Duncan was told of the discovery of her daughter-in-law's body, the older woman smiled faintly but made no comment.

She was quoted later as saying she could not understand why anyone would confess to such a brutal slaying and attempt to link her with it.

It was just over one month ago that she disappeared from her apartment. Last to see her alive were Miss Sylvia Butler and Miss Doreen Corraini, Cottage hospital nurses in Santa Barbara, who visited at her apartment until 11:30 p.m. Nov. 17.

Since that time, the bizarre story has developed of a strange attraction of mother for son. Gustafson said he believes that motive for the hired killing was jealousy. The elder Mrs. Duncan flew into a rage when Frank Patrick Duncan, attorney with a prominent Santa Barbara law firm, married Olga.

Olga was the nurse on duty when Mrs. Duncan was treated at the hospital for an overdose of sleeping pills. She and Frank met at that time and a whirlwind romance ensued. She reportedly told Frank later that she was to have a baby and on June 20 they were married.

In letters to parents and relatives, Olga revealed that on her wedding night Mrs. Duncan threatened her life. For the next several months, information from Olga's letters and her reports to her physician indicated she lived a nightmare.

Mrs. Duncan harrassed her continuously, the girl reported to friends and relatives. She put notices in the newspaper saying Frank Duncan would not be responsible for his wife's debts and several times told Olga she should get out of town and leave her son alone.

Gustafson said he has evidence to indicate that Mrs. Duncan had previously tried to hire the killing of her son's wife. He would not elaborate, but said, "This is not the first time Mrs. Duncan tried to have her (Olga) killed."

Baldonado told officers that when Mrs. Duncan was making arrangements for them to "do away" with Olga she said she had "some acid and some pills if we needed them."

Gustafson said that this unusual case will be his first opportunity to try a murder case under the three-phase law he authored. The case, he said, provided he obtains a grand jury indictment of the trio, will be tried in three steps. First, the suspects will be tried to determine guilt, then to determine penalty and finally to determine sanity.

DEC 2

to Ventura county.

KIDNAP SUSPECTS

They were arrested in Santa Barbara on suspicion of kidnaping after the elder Mrs. Duncan was placed in custody in connection with obtaining a fraudulent annulment in Ventura. Baldonado was released on that charge by Santa Barbara authorities, however, and re-arrested, by Henderson and Osborne for Ventura county on a charge of failure to provide for his wife.

Baldonado maintained that Mrs. Duncan had never paid him any money she had promised.

After his confession, which he wrote out and signed in Ventura county jail, Baldonado made a map for officers to use in locating the grave. His map was not accurate, however, and after an initial search of the area failed to locate the body, Baldonado agreed to lead them to the spot.

He had officers stop twice at locations he thought to be the

ted obtaining the fake annulment papers Aug. 7. She came to Ventura at that time with Ralph Winterstein, 26-year-old ex-convict still at large, and Mrs. Emma Shortt, a friend.

A warrant has been issued for Winterstein charging him with forgery and perjury.

Mrs. Shortt, questioned by authorities, provided them with some key information in the case and at her request is being secreted away somewhere in Ventura county.

When Mrs. Duncan appeared in Ventura municipal court last week, she was represented by her son. He said he had talked to his mother and was convinced she was not lying when she said she knew nothing of Olga's disappearance.

He said authorities should

Mrs. Duncan has changed attorneys, her son obtaining the services of S Ward Sullivan, noted criminal lawyer.

In Santa Barbara city jail, Moya denied charges, police said. He buried his face in his hands and muttered, "I don't see why he (Baldonado) would say I had anything to do with it."

In Benito, Manitoba, Canada, Olga's mother, Mrs. Jessie Kupczyk, was reported to have collapsed from shock and a heart attack when she learned that her daughter had been slain.

Elias Kupczyk, 61, Olga's father, refused comment on the brutal slaying. He said he planned to leave shortly to arrange burial for his daughter.

Duncan was unavailable for comment.

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lic opinion, crosses the rational course of justice and administration just as strongly, and under certain conditions far more so, as the 'star chamber' proceedings of an 'absolute' ruler has been able to do. In this connection, that is, under the conditions of mass democracy, public opinion is communal conduct born of irrational 'sentiments.' Normally it is staged or directed by party leaders and the press" (p. 221).

(20)

Harold Laski, *The American Democracy* (The Viking Press, Publishers, 1948)

"In no country in the world today has the lawyer a standing remotely comparable with his place in American politics" (p. 110).

(21)

Gunnar Myrdal, *An American Dilemma* (Harper Brothers, Publishers, 1944)

"The jury, for the most part, is more guilty of obvious partiality than the judge and the public prosecutor" (p. 552, discussing justice for Negroes in southern courts).

Brown, whom Gustafson supported in his campaign, "said he would do away with capital punishment if he could," says the D.A. "I disagreed with him on that and he knows it. His Republican opponent said he would not do away with it."

Probably the No. 1 foe of the death penalty in the legislature, says Gustafson is Sen. Fred Farr (D-Monterey).

But he believes that the [illegible] case and the torture-murder slayings attributed to confessed killer Harvey Glatman in San Diego county will deter a number of legislators from voting for abolition during the coming legislative session.

The use of the word "deter" brings up the major argument voiced in some quarters on the use of capital punishment. Those proponents have said that the penalty of death is a [illegible] "deterrent" to those who might commit murder.

extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

(12)

People v. *Ford,* 25 Cal. App. 388

" . . . Ordinarily where there is an existing highly inflamed condition of the public mind prejudicial to a person charged with crime, it finds some manifestation through the public press, or by assemblages of the people in the neighborhood of the scene of the crime, and, if general, in other parts of the county. . . . "

(13)

Bernard Botein, *The Prosecutor* (Pocket Books, Inc., Publishers, 1957)

"This is my recurring premise, conjugated in case histories—that a ruthless, resourceful prosecutor, indifferent to the rights of defendants, can with little risk win headlines or fame. Such a small group of lawless law-enforcement officers, dangerous out of all proportion to their number, can evolve only because most of us are entirely unaware of the anatomy of a prosecuting agency. We form strange, romantic notions of a district attorney's job, shaped by fictional and Sunday supplement stories.

"When reading unabashed fiction we exult in the skill with which Perry Mason or Ephraim Tutt put the overweening and ruthless prosecutor to rout. Through many pages, before we reach the courtroom finale, the author has taken pains to win our sympathy for the morally, if not legally, innocent defendant; and to excite our detestation for the loathsome district attorney, who would offer the defendant as a human sacrifice on the altar of his ambition and vanity. We find ourselves ranged on the side of virtue, which is a good enough fictional equivalent for law and order.

"But in real life this same concern for law and order sometimes causes us unwittingly to admire and vote for the very type of prosecutor we loathe in fiction—provided he puts on a resounding show in lashing the hapless suspect. Everybody is for curbing crime, and as vigorously as possible. Unfortunately, the public has no means of distinguishing official vigor from official excesses. It is safer politically for a prosecutor to ride roughshod over the rights of an accused, provided he does so with energy and fanfare, than to proceed cautiously with scrupulous regard for those rights. The latter course might be misconstrued as coddling criminals or official laxity. As the late Justice Jackson wrote, 'District attorneys who have been rebuked by the courts are frequently promoted by the public.'

"In real life there is no helpful author to convince us of the innocence of the defendant. The mere accusation by vested authority so debases the accused in the public mind as to muffle his protestations of innocence; and also taints anyone who questions the prosecutor's methods. Prosecution becomes largely an *ex parte* business. The major vice of some few prosecutors—abuse of human rights and privileges—becomes a major virtue in the eyes of the public.

"I do not recall any prosecutor ever coming a cropper because of the harshness of the methods he employed—provided he did not invite scrutiny by some collateral political blunder. This holds true as well in related fields of public service. If a United States senator advocates high taxes he will be criticized by colleagues, newspapers and persons opposed to such a program. However, let him investigate fraud in the processing of those tax returns, and he can do no wrong.

"The remedy, as I see it, is not to strip prosecutors of any of their powers. As balanced by a proper regard for the protection afforded the individual by the Bill of Rights and related legislation, a prosecutor needs these powers to do an effective job. But I believe abuse of these necessary powers can be discouraged through a critical public made aware of prosecuting methods. And I also believe that a tendency by the decent members of a prosecuting

staff to shrug off the improper conduct of a few associates as a matter of their personal privilege will diminish as they are jolted into realization of the consequences" (pp. 243-245).

(14)

Statement of John Lord O'Brian Concerning Prosecutions Under the Espionage Act of 1917, Quoted in Zechariah Chafee, Jr., *Free Speech in the United States* (Harvard University Press, Publishers, 1948)

"It has been quite unnecessary to urge upon the United States Attorneys the importance of prosecuting vigorously, and there has been little difficulty in securing convictions from juries. On the contrary, it has been necessary at all times to exercise caution in order to secure to defendants accused of disloyalty the safeguard of fair and impartial trials. In addition to the causes already recited there were the patriotic agitations continually being carried on by the Liberty Loan speakers, four-minute men and others, all of which worked the whole country up to a pitch of intense patriotism, resulting in instinctive aversion toward anyone even under suspicion for disloyalty" (p. 67).

Also Chafee:

"For the human machinery broke down at a second point—the jury. It is sometimes suggested that a jury trial gives a sufficient protection for freedom of speech, and that public sentiment will inevitably reflect itself in verdicts of acquittal if the prosecution seems unjust. It is undoubtedly true that in England freedom of discussion is, as Dicey says, 'little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written.' In my first chapter, however, I have endeavored to show that this protection is entirely inadequate and that the constitutional provision must mean much more. It is only in times of popular panic and indignation that freedom of speech becomes important as an institution, and it is pre-

cisely in those times that the protection of the jury proves illusory. As the Assistant to the Attorney General admits, 'There has been little difficulty in securing convictions from juries'" (p. 70).

(15)

Joseph Ratner (Ed.), *The Philosophy of Spinoza* (The Modern Library, Publishers, 1927)

"If we imagine men to love or hate a thing, we shall therefore love or hate it; that is to say, we shall therefore rejoice or be sad at the presence of the thing, and therefore we shall endeavor to do everything which we imagine men will look upon with joy, and, on the contrary, we shall be averse to doing anything to which we imagine men are averse.

"He who imagines that he affects others with joy or sorrow will necessarily be affected with joy or sorrow. But since man is conscious of himself by means of the emotions by which he is determined to act; therefore if a person has done anything which he imagines will affect others with joy, he also will be affected with joy, accompanied with an idea of himself as its cause; that is to say, he will look upon himself with joy. If, on the other hand, he has done anything which he imagines will affect others with sorrow, he will look upon himself with sorrow" (pp. 241-242).

(16)

R. M. MacIver, *The Web of Government* (The Macmillan Company, Publishers, 1948)

". . . All institutions, whether dignified by ceremony or not, tend to implant in men a sense of the authority that maintains them. Since the state is the guardian and maintainer, at least in a formal sense, of all social institutions the might of its authority is omnipresent. Whatever men do, whatever they strive for, predicates under normal conditions the existing frame of institutions. Our dependence on institutions becomes identified with our dependence on authority, and the value we attach to in-

stitutions is reflected in our respect for authority" (p. 46).

"Power is multi-form. By social power we mean the capacity to control the behavior of others either directly by fiat or indirectly by the manipulation of available means. Property and status are thus sources of power. But there are various other sources. The office a man holds gives him a certain amount of power, apart from the status attaching to it or the particular prestige of the office-holder. This is the power of bureaucracy. Akin to it is the power of any specialist, who can take advantage of his function or technique to control to his liking the actions of other men. There is also the ampler power accruing to the headship of any organization, varying with the kind of organization and its extent . . ." (p. 87).

"The agencies of publicity take higher rank in the power structure. Here we reach a source of power peculiarly modern, the control, through ownership or otherwise, of those media of communication that transmit news or promulgate opinion. We include here the motion picture industry, since it purveys news and since the films it produces inevitably are impregnated with some kind of doctrine or at least with some philosophy of life. We include the radio, though, owing to the technical conditions of broadcasting, governmental regulation and other considerations restrict tendencies to make this medium the organ of the particular doctrines or policies of the companies which own it—where the radio system is not state-administered. Where democratic conditions prevail state administration is itself subject to similar restrictions. It is otherwise with the business of publishing, especially the publishing of newspapers and periodicals. Since news-gathering is a vast and costly enterprise and since the economics of newspaper publishing limits the number of major newspapers in any area to a very small group, the power of the press is concentrated in the hands of a few men. This power of the press is increased through the development of newspaper chains under one ownership, through the syndication of articles and features, and through the hook-up of newspapers with radio stations. The newspaper has another kind of power, in that it determines

the degree of publicity to be assigned to the doings of persons and organizations, apart from the publicity of paid advertising. The importance of this power depends on the fact that publicity in modern society is not only a factor of prestige but also, for certain occupational categories and for many kinds of organization, a primary condition of success in their respective pursuits" (pp. 89-90).

(17)

Thomas Hobbes, *Leviathan* (Basil Blackwell, Oxford, Publisher)

"And as the power, so also the honour of the sovereign, ought to be greater, than that of any, or all the subjects. For in the sovereignty is the fountain of honour. The dignities of lord, earl, duke, and prince are his creatures. As in the presence of the master, the servants are equal, and without any honour at all; so are the subjects, in the presence of the sovereign. And though they shine some more, some less, when they are out of his sight; yet in his presence, they shine no more than the stars in the presence of the sun" (p. 120).

(18)

Robert E. Cushman, *Civil Liberties in the United States* (Cornell University Press, Publishers, 1956)

"Community hysteria whipped up by 'yellow' press and radio stories of crimes may well make it impossible in many instances to empanel a jury which can keep out of its mind the prejudice and antagonisms thus aroused" (p. 152).

(19)

Gerth and Mills (Tr.), *From Max Weber: Essays in Sociology* (Oxford University Press, Publishers, 1946)

". . . Every sort of 'popular justice'—which usually does not ask for reasons and norms—as well as every sort of intensive influence on the administration by so-called pub-

VENTURA COUNTY

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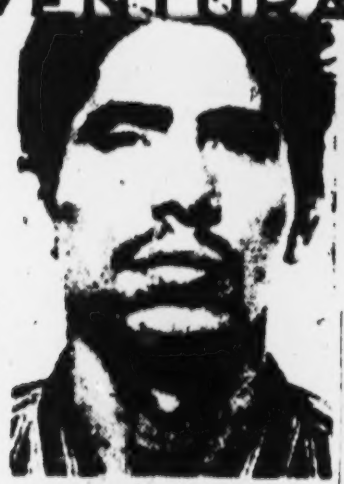

AUGUSTINE BALDONADO
Leads Way to Grave

MRS. ELIZABETH DUNCAN
Smiles When Told Body Found

Mrs, Duncan's Lawyer Plans To Enter Plea of 'Not Guilty'

Los Angeles attorney S Ward Sullivan, veteran criminal lawyer, said today he will enter a plea of "Not guilty" for Mrs Elizabeth Duncan, 54-year-old Santa Barbara woman expected soon to be charged with murder

Sullivan, obtained to represent Mrs Duncan by the woman's son, Frank Patrick Duncan spent more than an hour with his client in the women's portion of Ventura county jail today

"She denies having any part of the killing of Olga Duncan," Sullivan said.

He said she admitted having met both Augustine Baldonado and Luis Moya who are believed to have committed the actual killing Baldonado has confessed to the killing and said he and Moya were hired by Mrs Duncan to do the job.

Sullivan said that "she feels someone else is trying to involve me in the murder," but he would not say whether she told him who that might be

Asked what the feelings was between the two women, the son's wife and the mother in law, Sullivan said that 'here was no indication of hatred on the part of Mrs Duncan "She has told me, however, that there was no love lost between them"

After talking to her in the jail, Sullivan went down town to purchase some clothes for his client, explaining that she had not had an opportunity to bring other clothes with her from Santa Barbara

"This is a very complex matter," Sullivan said "There are many ramifications" He estimated that once the matter comes into court it may take as long as a month to try the case.

BULLETINS

An autopsy, today revealed that Mrs. Olga Duncan died as a result of asphyxiation, Coroner Virgil L. Payton said. He said it is impossible to determine whether death resulted from strangulation or from suffocation after being buried. The woman sustained numerous lacerations about the head, but no skull fracture. Payton said this ruled out the possibility that she was bludgeoned to death and made it a possibility that she was buried alive.

WASHINGTON — (UPI) — President Eisenhower announced today that he will submit to congress a balanced budget for the new fiscal year with revenues and spending "in the general area" of 77 billion dollars.

STARGAZER SAW:

DIANNE STEELE avoiding the mistletoe

can had previously tried to hire the killing of her son's wife. He would not elaborate, but said, "This is not the first time Mrs Duncan tried to have her (Olga) killed."

Baldonado told officers that when Mrs Duncan was making arrangements for them to "do away" with Olga she said she had some acid and some pills if we needed them."

Gustafson said that this unusual case will be his first opportunity to try a murder case under the three-phase law he authored The case, he said, provided he obtains a grand jury indictment of the trio, will be tried in three steps First, the suspects will be tried to determine guilt, then to determine penalty and finally to determine sanity.

There is the possibility that since Olga was carrying a child of more than five months that authorities will consider the case a double homicide

Gustafson talked to Mrs Duncan last night in the county jail No disclosures were made as to the content of the discussion

He said today that the case has been developed as the result of outstanding police work on the part of investigators in his office and the sheriff's department Clarence Henderson directed the district attorney's investigation.

The break in the case came yesterday morning when Ray Higgins, investigator for the Ventura county sheriff's office, resumed questioning of Baldonado. Higgins had questioned the suspect in previous cases of a less important nature and felt he could eventually get through to him.

"We were discussing the case and his involvement," Higgins said "when he jumped up and said, 'I'll do it for my kids,' and started talking" (Baldonado's wife, from whom he is separated, gave birth to twins Nov. 23.)

Higgins called in his boss, Lt. William Woodard of the sheriff's detective bureau, and Clarence Henderson and Tommy Osborne, investigators for the district attorney.

This is the story Baldonado told:

With Moya, Baldonado said he was approached by Mrs. Duncan early in November, he can't remember the exact date, and offered $6,000 to "get rid of" the 30-year-old nurse, wife of Frank Duncan, and an expectant mother.

Higgins reported that Baldonado talked freely once he got started. He told of renting a car from Sarah Contreras for $25 and borrowing a .22 pistol from Chico Rojo, Santa Barbara friends. For a couple of days the suspect said, he and Moya rode around in the car making plans

(See NURSE'S, Page 2)

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PETITION NOT PRINTED
IN THE

Supreme Court of the United States

October Term, 1960.

No. 185

AUGUSTINE BALDONADO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

RESPONDENT'S BRIEF.

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IN THE

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THE PEOPLE OF THE STATE OF CALIFORNIA.

RESPONDENT'S BRIEF.

Introduction.

Despite the attempt to persuade this Court that his discussion of the questions asked by this Court is objective, petitioner indulges in a subtle character assassination of Roy A. Gustafson, the District Attorney of Ventura County who prosecuted petitioner. In the text of the brief (and omitting the innuendoes from the appendices), petitioner obviously charges that Mr. Gustafson:

1. Made "extraordinary statements."

2. "[H]ailed the death verdict" of Elizabeth Duncan.

3. Made "vigorous and extensive arguments for imposition of the death penalty which were inten-

tionally given to the press and widely disseminated."

4. Made a "deliberate effort to interfere with petitioner's penalty hearing."

5. Is not a "sober, discreet and religious person."

6. Tried his case "outside of the courtroom."

7. Engaged in a "newspaper campaign."

8. Created a "prejudicial atmosphere."

9. Tried his case "in the mass media."

10. Engaged in "improper methods."

11. Participated in "inflammatory conduct."

12. "[C]arried on a brainwashing campaign to condition the local populace to his persuasion."

13. "[P]ropagandized on the main subject of this petitioner's jury trial."

14. Undertook "Madison Avenue packaging of the case."

15. "[C]arried out a deliberate press campaign to obtain the death penalty."

16. Participated in permitting "photographing the proceedings [of the Duncan trial] in derogation of Canon 35 of the Canons of Judicial Ethics."

Respondent asks this Court to decide this case on the record, not on the basis of the unfounded charges against Mr. Gustafson made by petitioner's counsel. Moreover, respondent respectfully submits that the gov-

erning authorities are (1) the Constitution of the United States, (2) its interpretation by the courts, and (3) the laws (statutes and judicial decisions) of California and not the opinions of sociologists, psychologists, attorneys, newspaper editors, law professors and others (as contained in Appendix C of Petitioner's Brief).

(It perhaps should be noted parenthetically that the record of Mr. Gustafson belies every charge made against him by petitioner. The following facts are common knowledge of which judicial notice may be taken: Mr. Gustafson has been admitted to the bar since 1942 and to the bar of this Court since 1945. After eight years of practice, during which he defended persons accused of crimes, he took office as the elected District Attorney of Ventura County in 1951. He resigned this year during the middle of his third term and returned to private practice. He is a Fellow of the American College of Trial Lawyers, an organization having an unusually high standard of ethics and which elected him to membership *after* the trial of this case. He has been a member and chairman of the California Law Revision Commission [appointed by the Governor of California, confirmed by unanimous vote of the Senate and elected chairman by the Commission members]. Elected by the lawyers to the Board of Governors of The State Bar of California in 1951 [to represent the counties of Ventura, Santa Barbara, San Luis Obispo, Monterey, Santa Cruz, San Benito

and San Mateo], he was elected Vice-President for 1953-54. He is rated "a" for legal ability in the Martindale-Hubbell Law Directory, the only approved general law list of the American Bar Association. He is the author of articles, notes and book reviews in 30 Southern California Law Review 1 [1956]; 44 California Law Review 815 [1956]; 43 California Law Review 163 [1955]; 28 California State Bar Journal 56 [1953]; 29 Minnesota Law Review 214 [1944]. He is the draftsman of much California legislation [including the separate "penalty trial" in capital cases used in the instant case and praised by the American Law Institute in the preliminary drafts of the Model Penal Code] and has lectured on legal subjects at Stanford University, University of Southern California, University of California and U. C. L. A. Respondent does not contend that these facts make it impossible for Mr. Gustafson to have been guilty of improper conduct, but respondent does contend that this Court should not determine what Mr. Gustafson said or did or intended to do by what was reported in newspapers or by what petitioner alleges as conclusions. Mr. Gustafson is at the very least entitled to the presumption that he did not engage in misconduct in the absence of competent evidence that he did. As will be pointed out, there is no such evidence in the record.)

ARGUMENT.

I.

Was Petitioner's Right to the Trial Guaranteed by the Due Process Clause of the XIV Amendment Violated in View of the Conduct of the District Attorney, the Resulting Publicity, and the Other Circumstances Under Which the Trial Was Held?

Respondent understands that the sole point posed by the Court's question is whether by holding petitioner's trial before a jury in Ventura County on April 6, 1959, California deprived petitioner of a fair trial. Petitioner claims that it was impossible for him to be fairly tried before a jury at that time and place because of the newspaper publicity regarding the case.

Petitioner murdered Olga Duncan on November 17, 1958. He was brought to trial nearly five months later for the sole purpose of having his penalty fixed, he having theretofore pleaded guilty to first degree murder. The sole question before the jury was whether petitioner should be imprisoned for life or executed. The jury determined that he should be executed.

Petitioner, in his appeal to the California Supreme Court, alleged that numerous errors occurred during the judicial proceedings against him. That court found that except for one evidence ruling which was nonprejudicial, no errors occurred. It unanimously affirmed the judgment. *People v. Baldonado,* 53 Cal. 2d 824, 350 P. 2d 115 (1960). Respondent understands that this Court's order on granting certiorari eliminated any ques-

tion of the propriety of the trial judge's rulings during the course of the judicial proceedings (except insofar as jurors with opinions were "permitted" to serve, a matter treated separately under the second question posed by this Court). Thus the issue is confined to whether facts and circumstances outside of the judicial proceedings and prior to the trial deprived petitioner of a fair trial. There is no showing that any fact or circumstance occurred outside the judicial proceeding except the publication of the newspaper articles which were submitted as exhibits to an application for change of venue. Consequently, the narrow issue is whether the pre-trial publications prevented the selection of a fair and impartial jury.

A. The Sole Question Concerning Newspaper Articles Is Their Effect on Persons Exposed to Them, Not Whether They Accurately Report the Facts.

Suppose a newspaper published a story that the judges of the county held a meeting and unanimously declared that they hoped and expected that every person called as a juror for petitioner's case would vote for the death penalty. No such meeting was held and no such statement made by any judge. Nevertheless, if the effect of reading the article was such that the reader thereafter could not fairly try petitioner, the fact that the story was wholly false would not make trial by such a person (as a juror) any less unfair.

In this connection it should be noted that the out-of-court conduct of the District Attorney is not properly in question here, nor was it in the courts below. When petitioner's co-defendant Moya made an application for change of venue on January 13, 1959, news-

papers were attached as exhibits. Petitioner made a similar application at the same time and incorporated by reference the exhibits offered by his co-defendant. The question before the judge was whether (assuming all prospective jurors would have read the articles) the effect of the articles on every reader would be that he would be unable to fairly try petitioner on the issue of penalty. Where an article purported to relate a statement by the District Attorney, the judge was not concerned with whether the District Attorney actually made such a statement or with whether it was true, but with whether the effect on every prospective juror was such that he would necessarily become and remain legally biased.[1] In arguing the motion for change of venue in the trial court, counsel for petitioner's co-defendant acknowledged this when he said: "And it doesn't make any difference whether the publications . . . were true or not." [Tr. of R., pp. 72-73.] Petitioner's counsel took no different position.

The District Attorney did not file an affidavit denying the making of those statements (among those attributed to him in the newspaper exhibits) which were in fact not made by him. The reason is simple. Whether he made any or all of the statements attribut-

---

[1]The words "biased" and "prejudiced" as used throughout this brief refer to a state of mind wherein a person's opinions are so fixed that he is unable to decide an issue on the basis of evidence presented to him unaffected by the previously formed opinions. In California, as in almost all jurisdictions, a person is not "biased" or "prejudiced" simply because he has heard or read about a case or because he has formed opinions about the issues if, notwithstanding his opinions, he can decide the case solely on the evidence presented in court. To distinguish between one who has an opinion which does not disqualify him as a juror and one whose opinion is "fixed" and thus disqualifying, the latter is often referred to herein as "legally biased."

ed to him was not in issue. If a prospective juror read an article quoting the District Attorney as having said something which he actually did not say, the effect on the prospective juror would be no less if the District Attorney filed an affidavit in court denying that he made the statement.

Moreover, the out-of-court conduct of the District Attorney can not be proved by newspaper articles attached as exhibits to an affidavit supporting a motion for change of venue. The fact that a newspaper says that the District Attorney made a certain statement is not proof that the statement was made. It is the rankest kind of hearsay. The California Supreme Court recognized this fact and carefully used such phrases as "an article quoted the district attorney at length", and as "the district attorney was reported to have made" certain statements. The California Supreme Court noted that at oral argument "the district attorney denied making most of the statements attributed to him." The California Supreme Court, in other words, recognized, as did the trial court and counsel, that the purpose of the exhibits was to determine whether prospective jurors who might have read them would necessarily have become biased and not to determine whether what the articles said was true.

Respondent has treated this point at length because petitioner sought certiorari on the claim that the articles were proof of the facts stated therein and because this Court, in its order of June 27, 1960, seemed to accept this view when it asked whether "the conduct of the District Attorney" violated petitioner's right to a fair trial.

B. The Newspaper Publications Were Not Such as to Cause Every Person Who Read Them to Become Legally Biased.

Since there is nothing in the record to indicate that any particular juror actually did not act fairly and impartially, any conclusion that a juror did not so act must necessarily be based on the premise that because of the newspaper publications the juror *could not* (and therefore the juror *did not*) act fairly and impartially.

For convenience in discussing this point, respondent has divided the publications into two categories which will be separately discussed.

1. The Reported Facts of the Crime.

Olga Duncan, a pretty, young Santa Barbara nurse who was the wife of a Santa Barbara attorney, disappeared on November 17, 1958. She was pregnant and there soon began to be news stories about her disappearance. By the middle of December, interest in the case had spread beyond Santa Barbara County. Los Angeles newspapers carried stories about the matter and newspapers in Ventura County likewise did. At this time there was no indication that Ventura County had anything to do with the case.

Then on December 22, 1958, the newspapers reported that petitioner, awaiting sentence in Ventura County on another charge, confessed that he murdered Olga Duncan on November 17, 1958, and buried her in Ventura County. [Exs. 3, 10, 24, 30 to Affdvt.; Tr. of R., pp. 43, 45, 47.] On December 26, 1958, the newspapers reported that petitioner's co-defendant Moya also confessed the murder. [Exs. 18, 26, 34 to Affdvt.; Tr. of R., pp. 46-47.]

After the transcript of the grand jury hearing was filed, it became a public record, *People v. Darby*, 114 Cal. App. 2d 412, 250 P. 2d 743 (1952), and the newspapers quoted at length from the testimony including that given by petitioner as a witness.

It is here extremely important to note that the newspaper exhibits which are in the record in petitioner's case (as opposed to co-defendants Moya and Duncan) are very limited in number. They are only those which were submitted on January 13, 1959. [Tr. of R. p. 51.] Thus they do not include any accounts of the trial of co-defendant Duncan or any reported comments of the trial judge. Hence these matters are not discussed in this brief.

When petitioner's trial began on April 6,1959, penalty was the sole issue to be determined, petitioner having theretofore pleaded guilty to first degree murder. The first question before this Court is whether each and every person reading the newspaper articles relied upon by petitioner would necessarily be of such frame of mind that he could not fairly and impartially determine whether petitioner should suffer the death penalty or life imprisonment.

Respondent believes that the answer to the question can be supplied only by the subjective reactions of the members of this Court after reading the limited number of exhibits pertinent to petitioner's case.

If a member of this Court can read the articles without concluding that if he were to try the case, he would impose the death penalty on petitioner regardless of what the evidence might be, then petitioner's

right to a fair trial was not infringed.[2] This is so for the reason that nothing in the record indicates that any of the twelve jurors had any fixed opinion from any source as to what the penalty should be and nothing indicates that any juror was less capable of deciding the case on the evidence than a member of this Court would be. On the contrary, the jurors all declared that they would decide the case solely on the evidence and petitioner accepted these declarations because he did not challenge a single juror!

Respondent submits that a reading of the exhibits would not leave every reader in the frame of mind that petitioner should be executed regardless of whatever evidence might be presented in court.

2. *The Reported Remarks of the District Attorney.*

The District Attorney is quoted in the Ventura County Star-Free Press of December 22, 1958, and the Oxnard Press Courier of December 24, 1958, as being in favor of the retention of the death penalty in California. [Exs. 3, 4 to Affdvt.; Tr. of R. p. 43.] Petitioner claims that the article was a demand by the District Attorney that petitioner be executed and that the story necessarily would influence every reader against petitioner.

---

[2]The converse is not true. If a member of this Court upon reading the newspapers feels that he would thereafter be unable to fairly try the case, it does not mean that all persons would have similar reactions. Before concluding that petitioner was deprived of a fair trial, it would be necessary to find that (1) all persons would necessarily be affected in the same manner as the Justice, (2) at least one juror read the matter deemed offensive, (3) the reaction continued to exist from the time of reading to the time of trial, (4) the juror in stating that he could try the case fairly was incorrect in his conclusion and (5) petitioner may raise the point in this Court even though at the trial he did not challenge any jurors on the ground of bias.

In the first place, the statement on its face shows that it was concerned with contemplated legislation, not with the trial of petitioner's case. That the reporter of the Ventura County Star-Free Press considered it as such is illustrated by the opening sentence of the story: "District Attorney Roy Gustafson saw the Duncan murder as reason for a continuation of California's death penalty." The headline writer saw it in the same light because the headline reads: "D. A. Urges Death Term in Killings." There was only *one* killing involved in the instant case. The plural word "Killings" clearly indicates that the statement related to the retention of capital punishment for murders in general and not for this particular murder alone. There was nothing unusual in the District Attorney's public statement on this subject because he had often been quoted in his appearances before the California Legislature in opposition to the repeal of capital punishment. In fact, Coronet magazine (Jan. 1960, p. 136) described him as "one of the nation's most outspoken advocates of capital punishment."

In the second place, when this statement was published petitioner was not under arrest for, nor charged with, the murder. His name was not mentioned in the statement. It was yet to be determined who would be charged with being the perpetrators of the murder much less who, if anyone, would ultimately be convicted thereof.

Certain it is that not every person who read the statement of the District Attorney was persuaded to his point of view regarding capital punishment. The only reactions received by the newspaper to the published statement were protests against it as evidenced by

published letters to the editor on December 24, 1958, December 30, 1958, and January 3, 1959. [Tr. of R. pp. 17-21.] Moreover, 13 out of the 61 prospective jurors examined were excused on challenges for cause because of their conscientious scruples against the death penalty. Again, it is obvious that if the 13 persons read the statement of the District Attorney, they were not in the least persuaded by it.

An article of December 30, 1958, in the Ventura County Star-Free Press set forth what purported to be the District Attorney's reasons why he would seek the death penalty as to petitioner and his co-defendants. (The fact that the article was not true is indicated by the issue of the same newspaper on February 24, 1959 [Exh. A-14 to Declar.; Tr. of R. (Moya Case), p. 66], reporting that the District Attorney had not even then stated whether he would seek the death penalty for the co-defendant then being tried.) However, respondent acknowledges that the truth or falsity of the publication is not in issue. The question is whether those who read the article would become so biased that they could not fairly try the petitioner.

The answer seems evident. In any capital case every prospective juror necessarily knows before the trial commences whether the prosecuting attorney will seek the death penalty. This is apparent from the examination of the jurors as to their views with respect to capital punishment. In petitioner's case, where the only issue was punishment, there would have been no trial at all if the District Attorney had not been seeking a death verdict because under California law the punishment would be life imprisonment if the District Attorney agreed to it. Cal. Penal Code, §1192.3.

Petitioner seeks to leave the impression that purported comments from the District Attorney of Ventura County were more damaging than they otherwise would have been because Ventura County is a small, rural area (and presumably everyone knew the prosecutor). This Court can take judicial notice of the 1960 preliminary census figures. They show that of the more than 3,000 counties in the United States, Ventura County ranks in the upper 5% in population. Moreover, of the 34 prospective jurors asked by petitioner's counsel as to whether they knew the District Attorney, only six replied in the affirmative. [Tr. of R. pp. 104, 128, 130, 162, 178, 198.]

Petitioner erroneously assumes not only that the District Attorney actually made the out-of-court statements attributed to him but also that it is misconduct for an attorney to make an out-of-court statement. The fact is that in California there is no rule of professional conduct prohibiting attorneys from making out-of-court statements. (See 34 Calif. S. B. J. 859 [1959] for a proposal that there be such a rule in California.)

Whether attorneys for the defendants in the three cases actually made out-of-court statements about the cases to newspaper reporters is unknown to respondent. However, the newspaper exhibits before this Court contain no less than 69 reports of out-of-court statements purportedly made by counsel for defendants to newspaper reporters. See Appendix A. Typical of the comments reported are those set out in Appendix B.

Even if, contrary to the facts and the California law, this Court concluded (1) that out-of-court statements were made by attorneys on both sides and (2)

that the attorneys were guilty of misconduct in making the statements, it must be remembered that the proceedings in this Court are not for the purpose of disciplining attorneys by reversal of the judgments of the Supreme Court of California or by any other means. The sole question here is whether petitioner's conviction was had under circumstances depriving him of a fair trial.

It would unduly extend this brief if each of the articles purporting to quote the District Attorney was discussed in detail. Again respondent urges each member of this Court to read the articles and see whether he can conscientiously say that he would thereafter be unable to give petitioner a fair trial.

C. Assuming That Some Published Report Would Cause Every Reader to Become Legally Biased, There Is No Proof That Any Juror Who Served Read That Report.

Obviously nothing that occurred outside of the judicial proceedings and prior to the trial could possibly have affected petitioner's right to an impartial jury unless the event which occurred prevented at least one of the twelve jurors who served from trying the case fairly and impartially. Petitioner claims that published reports did so. Even assuming that one or more of the publications would have caused any reader to become legally biased, petitioner has not shown that any juror read those particular reports.

Those jurors who were asked by petitioner's counsel replied that they had either heard or read something about the case. However, petitioner's counsel did not ask any juror what he heard or read and did not even

ascertain the name of any newspaper which any juror might have read.

Between the date of the first newspaper exhibit (December 15, 1958) and petitioner's trial (April 6, 1959) there were 112 days. Yet the newspaper exhibits before the court in petitioner's case were the following number of issues of these respective papers:

Ventura Star-Free Press	14
Oxnard Press Courier	12
Los Angeles Examiner	1
Los Angeles Times	5
Los Angeles Herald Express	4

There was no showing that any juror read any issue of any of those newspapers. Respondent invites the Court's attention to the record containing the examination of the twelve jurors:

Berg [Tr. of R. pp. 95-97];
Bashor [Tr. of R. pp. 102-108];
Houle [Tr. of R. pp. 105-106];
Greer [Tr. of R. pp. 144-147];
Dodds [Tr. of R. pp. 177-179];
Dorner [Tr. of R. pp. 194-196];
Beesley [Tr. of R. pp. 97-99];
Tyrrell [Tr. of R. pp. 103-104];
Stearns [Tr. of R. pp. 143-144];
Jordon [Tr. of R. pp. 176-177];
Garrison [Tr. of R. pp. 182-183]; and
Clark [Tr. of R. pp. 198-200].

It is a well-known fact that most persons read newspapers only sketchily. Mr. Justice Frankfurter is quot-

ed as saying: "Very few people ever read anything except the headlines." Philips, Felix Frankfurter Reminisces, p. 169 (1960). Typical answers of jurors bear this out. For example, from Juror Stearns came this [Tr. of R. p. 143]:

> "Q. Have you read about this case? A. Not very much, sir."

From Juror Bashor [Tr. of R. p. 102]:

> "Q. Have you been following the progress of this case in the newspapers and over the radio? A. Well, I have part of it, not all of it. I've been too busy."

Even assuming that some particular report in one of the newspaper exhibits is deemed by this Court to be so damaging that anyone who read it would necessarily thereafter be unable to be fair to petitioner, the record is completely barren of any showing that any juror read the report.

The law in this situation is clear. In *People v. Chapman*, 93 Cal. App. 2d 365, 372, 209 P. 2d 121, 124 (1949), defendant claimed that a pre-trial newspaper article was so damaging that he could not be fairly tried in Alameda County. The appellate court rejected his claim with the observation that ". . . There is no evidence that any newspaper reports were read by any member of the jury. . . ." This court denied certiorari. *Chapman v. People*, 338 U. S. 943, 94 L. Ed. 581, 70 S. Ct. 423 (1950). In *People v. Cook*, 39 Cal. 2d 496, 499, 247 P. 2d 567, 568 (1952), defendant claimed "that prior to the trial the district attorney aroused the prejudice of the people against him

by making speeches about the case over the radio and at various civic meetings." Defendant's claim of lack of fair trial was rejected by the Supreme Court of California with the observation that "there is no evidence that any of the jurors who tried the case heard the speeches which were assertedly made."

If this Court believes that some particular article or articles would necessarily cause a reader to become legally biased against petitioner, respondent is at a loss to know how this Court can find that any juror read the offensive matter. The burden of showing this is on petitioner and he has not met it.

D. Assuming That at Least One Juror Became Legally Biased by What He Read, There Is No Proof That He Retained That Bias at the Time of Trial.

The newspaper articles in petitioner's case were published between December 15, 1958, and January 7, 1959. Petitioner's trial began three months after the last article was published. Even if this Court finds that one of those articles was so inflammatory that every reader would necessarily be influenced, consciously or unconsciously, to desire to impose the death penalty on petitioner and even if this Court finds (despite the complete absence of any showing in the record) that some juror read that article, the question still remains whether the juror retained that bias to the time of trial.

California recognizes that the fact that a whole community is aroused against a defendant by newspaper publications some time prior to trial is no proof that a fair and impartial jury cannot be obtained from that community at a later date. *People v. Yeager*, 194 Cal. 452, 229 Pac. 40 (1924), (offensive publication 17 days

before trial); *People v. Hall*, 220 Cal. 166, 30 P. 2d 23 (1934), (18 days); *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161 (1888), (three weeks); *People v. Suniga*, 128 Cal. App. 2d 738, 275 P. 2d 914 (1954), (three weeks); *People v. Mendes*, 35 Cal. 2d 537, 219 P. 2d 1 (1950), (three months); *People v. Burwell*, 44 Cal. 2d 16, 279 P. 2d 744 (1955), (four months).

E. Two California Courts Held That the Published Reports Would Not Make It Impossible to Obtain a Fair Jury.

Under California law the trial judge is required to grant a motion for change of venue if "a fair and impartial trial cannot be had in the county" where the case is pending. Cal. Penal Code, §§1033, 1035. Petitioner made such a motion on January 13, 1959, supported by the aforementioned newspaper exhibits. The motion was denied. [Tr. of R. p. 77.] The trial judge said:

> ". . . [A]fter carefully analyzing all of the material [the newspapers] submitted to me and after diligently and thoughtfully considering the entire case as far as it has developed up to the present time, I am unable to agree with counsel for defendants in their contention that the defendants cannot receive a fair and impartial trial in Ventura County.
>
> ". . .
>
> "If I had the slightest doubt in the world about the ability of the defendants to receive a fair trial in Ventura County I would without the slightest hesitation grant the motions for a change of venue."

The trial judge thus did not believe that all persons who read the newspapers and who would three months later become prospective jurors would be unable to give petitioner a fair trial. The Supreme Court of California was asked by petitioner to rule that the trial judge was wrong in this conclusion. Instead, that court affirmed the ruling of the trial judge denying the motion for change of venue. *People v. Baldonado,* 53 Cal. 2d 824, 350 P. 2d 115 (1960).

The California Supreme Court is well aware of the requirement that trial be had before impartial jurors. In *People v. McKay,* 37 Cal. 2d 792, 800, 236 P. 2d 145 (1951), the trial judge denied a motion for change of venue. Defendants' convictions by a jury were reversed by the Supreme Court for failure of the trial judge to order a change of venue. The court said:

> ". . . However conscientious the members of the jury might have been, it cannot reasonably be concluded that they could so divorce themselves from their past experiences and present surroundings that a fair and impartial trial could be had."

Eight California judges examined the newspapers now before this Court and not one found that the newspaper articles were such as to prevent prospective jurors from being fair. These views should be entitled to great weight in this Court.

F. Petitioner at the Trial Did Not Believe That Any Juror Was Legally Biased.

Sixty-one prospective jurors were examined in petitioner's case. This is not a large number for a capital case. Only 17 of those had formed opinions on the matter in issue, that is, what penalty should be applied

for the murder to which petitioner had pleaded guilty. Nine of these were found to have fixed opinions and they were all excused on challenges for cause by petitioner. The other eight prospective jurors said their opinions were not fixed and that they could fairly and impartially try the case. Nevertheless, most of these eight were excused on peremptory challenges by petitioner and the remainder were not challenged either for cause or peremptorily.

A ground of challenge to a juror is "the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party." Cal. Penal Code, §1073. Petitioner was well aware of this ground because he invoked it ten times. The trial judge sustained his challenge each time except as to prospective juror Openshaw [Tr. of R. p. 96] who was subsequently excused on a peremptory challenge. [Tr. of R. p. 135.] Not one person who ultimately served as a juror was challenged by petitioner for bias or any other reason. Certainly this is extremely strong evidence of petitioner's then belief that neither the newspaper articles nor anything else resulted in any juror who served being biased, partial or prejudiced.

A second indication of petitioner's attitude is his failure to move for a change of venue after the jury was selected. The trial judge expressly left that action open to him in denying his motion on January 15, 1959. [Tr. of R. p. 77.] If petitioner thought he could not get a fair trial because the jurors were biased, he would have then renewed his motion. That he did not do so

is strong evidence of the fact that there is no basis for his present charge that the jurors were biased. *Stroble v. California*, 343 U. S. 181, 96 L. Ed. 872, 72 S. Ct. 599 (1952).

Finally, petitioner in his motion for a new trial made no mention of any claim that he had been deprived of a fair trial by reason of the bias of the jurors due to newspaper publicity. [Tr. of R. pp. 79-83.]

G. Summary.

In *Stroble v. California*, 343 U. S. 181, 96 L. Ed. 872, 72 S. Ct. 599, 606 (1952), this Court was considering a California murder conviction which was preceded by intense newspaper publicity. Petitioner there had been described in the newspapers as a "werewolf", a "fiend" and a "sex-mad killer". His confession had been released by the District Attorney who also announced to the press his belief that petitioner was guilty. In finding that petitioner was not deprived of a fair trial, this Court said:

> ". . . Indeed, at no stage of the proceedings has petitioner offered so much as an affidavit to prove that any juror was in fact prejudiced by the newspaper stories. He asks this Court simply to read those stories and then to declare, over the contrary finding of two state courts, that they necessarily deprived him of due process. That we cannot do, at least where, as here, the inflammatory newspaper accounts appeared approximately six weeks before the beginning of petitioner's trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury."

In the case at bar there is no affidavit that any juror was in fact prejudiced. The newspaper accounts of which petitioner complains were published almost four months before the beginning of petitioner's trial. No hostile acts or other facts were shown which indicated any community, as opposed to individual, prejudice. The victim was not a resident of the county of trial and all of the events concerning the plot to kill her took place in the neighboring county of Santa Barbara. Petitioner points to no statement of fact in any newspaper story which was not borne out by the evidence introduced at his trial. The publication of petitioner's confession, taken from the public records of the testimony before the grand jury, could in no event have harmed petitioner since he publicly, in open court before the trial, pleaded guilty to the crime.

In *United States v. Handy*, 351 U. S. 454, 100 L. Ed. 1331, 76 S. Ct. 965, 970 (1956), petitioner claimed he had been deprived of a fair trial by newspaper publicity. This Court said:

> ". . . [P]etitioner asks this Court, in effect, to infer that the news coverage of the robbery and proceedings prior to petitioner's trial, including the Foster-Zeitz trial, created such an atmosphere of prejudice and hysteria that it was impossible to draw a fair and impartial jury from the community or to hold a fair trial. . . . [W]e are asked to read the news reports and the testimony as to other incidents and to find, contrary to the Supreme Court of Pennsylvania and two federal courts, that these reports and incidents did create such an atmosphere that it infected the jurors and

deprived petitioner of a fair trial on the evidence presented to them. We see no justification in the record to warrant our so finding."

In the case at bar, all of the newspaper articles were presented to the trial judge three months *before* the trial and he decided that they would not necessarily prevent the selection of fair and impartial jurors. The record affirmatively shows that all of the jurors selected said they could and would be fair and impartial notwithstanding what they read and that petitioner believed them because he did not challenge a single one for cause nor did he thereafter move for a change of venue. The Supreme Court of California held that the newspaper accounts were not such as to have required the trial judge to have granted any motion for change of venue.

In order to reverse the judgment, this Court would have to do the following things:

1. Find that one or more of the newspaper articles were so inflammatory that every reader would be prejudiced against petitioner.

2. Find that at least one juror read the particular articles deemed to be offensive.

3. Find that the prejudice thereby engendered in that juror continued from the date of reading to the date of trial.

4. Find that the juror falsely stated under oath that he could and would give petitioner a fair trial.

5. Find that petitioner's failure to challenge any juror or to move for a change of venue after the selection of the jury is of no significance.

Respondent submits that there is nothing in the record which would support such findings.

Respondent does not claim that the publicity did not result in some prospective jurors becoming biased. It obviously did because nine prospective jurors admitted that they had fixed opinions. But respondent does claim that from the fact that some persons become biased, it does not follow that all others must necessarily be likewise biased. Not all persons are persuaded to identical conclusions by the same article or the same speech.

The newspaper publicity in the case at bar admittedly gave rise to the opportunity for some prospective jurors to reach fixed opinions as to what penalty petitioner should suffer. But as Mr. Justice Holmes, writing for this Court, stated in *Holt v. United States,* 218 U. S. 245, 251, 54 L. Ed. 1021, 1029, 31 S. Ct. 2, 6 (1910), ". . . If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."

What was recently said in *Irvin v. Dowd,* 271 F. 2d 552, 554-555 (C. A. 7th Cir., 1959), certiorari granted 4 L. Ed. 2d 542 (1960), is appropriate:

> ". . . It is not surprising that, the more extensive the news coverage of a crime and the more wanton and unjustified the crime itself, the greater and more extensive is the indignation of citizens. Such indignation, varying in its degree according to the violence of the crime, and geographically extensive with the area of news distribution, undoubtedly causes many people to form im-

pressions or beliefs as to the guilt or innocence of suspected or indicted persons. In these days of widely effective and thorough news distributing instrumentalities, such as the telephone, newspaper, radio and television, as well as rapid travel of persons by automobiles, trains and airplanes, hardly a person anywhere in a state, or in fact in the United States, is long ignorant of the details of crimes committed in any state (or in this country), unless he be completely mentally incompetent or is in solitary confinement in a jail. In fact, it may well be that into the latter place the grapevine reaches. We no longer live in a day when what happened in the next county was learned only by conversation with a traveling man or a brakeman on the way freight train. It is into this modern society with facilities for quick and broad news coverage that a person who commits six murders projects himself. When apprehended, he is entitled to a fair trial and is to be accorded due process of law, according to the existing circumstances.

"Our problem in its last analysis is whether the general resentment of a people following the publication by news distributing media of information in regard to a series of murders may be relied upon to prevent the state from prosecuting a person indicted for these crimes, even though his trial be held before an unbiased judge and a jury is selected in accordance with established principles applicable to such a case. If the state is so prevented from trying such a person, it means that the commission within a state of a multiplicity of

criminal acts, followed by the usual publicity, actually immunizes the offender from prosecution. We reject such a conclusion as the law of this circuit."

It is of particular significance that in the present case nothing appeared in the newspapers that was not brought out during the trial. If the newspapers had published some particularly damaging facts about petitioner which either were not or could not have been introduced as evidence at the trial, the possibility of prejudice would have been increased. But here this Court must determine whether petitioner was deprived of a fair trial by pre-trial newspaper accounts of facts all of which (together with many more) the jurors ultimately heard from witnesses.

If such accounts are held to deprive an accused of a fair trial, then a large step in the indirect censorship of the press will have been taken. Public officers will conceal all information from the press (even though experience demonstrates that many crimes are solved and many wanted criminals are located through news items) for fear that publication of the information would jeopardize the ultimate trial of the accused. California will be forced to change its laws so that transcripts of preliminary examinations and grand jury hearings, which are now public records, will be made secret. (Even so, enterprising newspapers could nevertheless jeopardize a trial by printing information about a crime obtained from lay witnesses and other non-public sources.) Except for holding the newspaper in contempt of court, this Court will have for all practical purposes effectively forbidden the publication of

facts about the most interesting, significant and important criminal cases in this country. (Obviously, the minor, routine, unimportant cases get little or no publicity.)

It is no answer to say that where newspapers have given intensive publicity to a case, the trial should be delayed or moved to a different county. If the case is of widespread interest, the same publicity can be expected even though the trial takes place at a different time or place from that originally scheduled. (See Note, 63 Harvard L. Rev. 840 [1950].) Neither is it any answer to say that if the trial takes place as scheduled, a new trial should be granted. Again, it is naive to believe that similar publicity would not accompany the new trial.

When, as here, there is no editorializing, no demands for a particular result, no slanting of the news, no untrue statements, no publication of inadmissible facts and when, as here, the publicity does not result in any threat of violence, display of emotions or other conduct indicating an inflamed community, then the mere extensive news coverage should not be held to have deprived a defendant of a fair trial.

Finally, one important distinction should be noted between this case and cases arising from federal trial courts. In *Marshall v. United States,* 360 U. S. 310, 3 L. Ed. 2d 1250, 79 S. Ct. 1171 (1959), newspaper articles read by jurors during the trial were held to be so prejudicial that a new trial was granted by this Court. However, this Court acted in the exercise of its "supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts". It did not invoke the Due Process

Clause (of the V Amendment). While this Court undoubtedly would invoke the Due Process Clause (of the XIV Amendment) to reverse a state conviction if pre-trial publicity deprived a defendant of a fair trial, it has never done so. Respondent submits that there is less basis for doing so in the instant case than in other cases which have been before this Court.

II.

Was There a Violation of Petitioner's Right to a Fair Trial, as Guaranteed by the Due Process Clause of the XIV Amendment of the Constitution of the United States of America, Where in a Trial of a Capital Offense by Jury, the Trial Court Permitted to Remain in the Jury Box, and Sit in Judgment, Three Jurors Who Had Entered the Jury Box With Fixed Opinions as to Petitioner's Guilt, and Retained Such Opinions While Being Examined on Voir Dire?

Petitioner concedes in his brief that this "question certified for review does not involve this petitioner." Indeed, he could not do otherwise. No juror entered the box with a fixed opinion as to the penalty to be applied to petitioner, much less was any such person allowed to sit in judgment of petitioner. The fact that there is not, and could not be, any attack on the fairness and objectivity of even one juror emphasizes the lack of merit in petitioner's claim that he was denied a fair trial by pre-trial publicity. If, regardless of the pre-trial publicity, twelve fair and impartial jurors heard the case, how can petitioner claim that he did not get a fair trial because of something which happened long before the trial and did not affect the jurors who served?

III.

The Alleged "Failure of the State to Supply a 'Corrective Process'" Is Not an Issue Before This Court.

Petitioner, assuming that he could not get a fair trial because newspaper publicity was so prejudicial, quotes Mr. Justice Douglas as saying that the remedy in such a situation is "the granting of new trials, changes in venue or continuances." Respondent will discuss these in inverse order.

1. Continuance.

Petitioner, when his trial was originally set for February 16, 1959, asked for a continuance [Tr. of R. p. 6] but *not* on the ground that he could not obtain a fair trial. Although his request was denied [Tr. of R. p. 6], his trial was nevertheless later postponed until April 6, 1959. [Tr. of R. p. 23.] Petitioner did not object to the trial date, nor did he move for any continuance.

2. Change of Venue.

While petitioner moved for a change of venue on January 13, 1959, the denial of his motion was expressly made without prejudice to its renewal. [Tr. of R. p. 77.] He never renewed it.

3. New Trial.

While petitioner moved for a new trial, he did not assert as a ground for his motion that he could not or did not get a fair trial by the twelve jurors who heard his case. [Tr. of R. pp. 79-81.]

This Court must have recognized that petitioner is not now entitled to assert that California failed to sup-

ply a "corrective process" and that such failure was a denial of due process because this Court did not include this question in its order limiting the issues on certiorari. Petitioner's argument on this point is baseless and out of place.

Conclusion.

The facts concerning the murder of Olga Duncan were most unusual. It was therefore only natural that the case attracted world-wide attention through news media. Petitioner admitted his guilt of first degree murder and he has at no time questioned the sufficiency of the evidence to support the verdict decreeing that his penalty should be death.

This Court now asks whether petitioner was deprived of a fair trial. He obviously was not unless the publicity was such that one or more jurors had formed fixed opinions on the issue of penalty. The California Supreme Court put the matter succinctly:

> "Even if it be assumed that many persons formed opinions unfavorable to defendant as a result of what was published, it does not follow that persons without such views could not be found to act as jurors or that those who had adverse opinions would be unable to set them aside and try the case fairly on the basis of the evidence to be produced in court." *People v. Duncan,* 53 Cal. 2d 803, 812, 350 P. 2d 103, 108 (1960).

After examination of the jurors it was clear that there were nine who had formed no opinions whatever and that there were three who would be able to set

aside whatever opinions they had and decide the case solely on the evidence. Petitioner did not challenge a single one of the twelve jurors. He did not move for a change of venue after the twelve jurors were selected and before they were sworn. He did not at any time in the proceedings in the state courts claim that any one of the twelve jurors who actually tried the case was not fair and impartial.

Petitioner's motion for a change of venue, made almost three months before the twelve jurors were selected, can only be interpreted as a claim that all persons called as jurors who might say that they had no opinions actually would have fixed opinions adverse to petitioner and as a claim that all persons called as jurors who might say that they could and would set aside their opinions actually could not or would not be able to do so. These claims, made long before the trial began, that it would be impossible to find twelve impartial jurors were rejected by the trial judge when he denied petitioner's motion. They were rejected by the Supreme Court of California when it upheld the trial judge's ruling.

Respondent respectfully submits that there is nothing in the record which warrants this Court finding that the jurors who served were not fair and impartial despite their statements that they would be and despite petitioner's failure to challenge any one of them or to move for a change of venue after they had been ex-

amined. Nor is there anything in the record to warrant this Court finding that the trial judge and the Supreme Court of California were wrong in believing that petitioner did not demonstrate before the trial that it would be impossible to find in Ventura County twelve persons who could and would fairly and impartially try the case as jurors.

Respectfully submitted,

STANLEY MOSK,
Attorney General,

WILLIAM E. JAMES,
Assistant Attorney General,

BRUCE A. THOMPSON,
District Attorney,
County of Ventura,
Attorneys for Respondent.

APPENDIX A.

Attorneys defending the three charged with the murder of Olga Duncan were: for Baldonado, John Danch; for Moya, Burt Henson; for Duncan, S. Ward Sullivan and Frank Duncan (the latter being formally made attorney of record on March 24, 1959). All are attorneys of record on this appeal.

For the convenience of this Court, the publications in this record in which it is reported that statements pertaining to the case were made out of court by attorneys for the defendants are here tabulated:

Date	Newspaper	Page	Exhibit	Attorney Quoted
22–1958	Ventura Star-Free Press	A-1	3	Sullivan
22	Los Angeles Times	25	30	Sullivan
22	Los Angeles Herald Express	A-4	10	Sullivan
23	Ventura Star-Free Press	A-1	16	Sullivan
23	Oxnard Press Courier	A-1	25	Sullivan
23	Los Angeles Times	1	31	Sullivan
24	Ventura Star-Free Press	A-1	17	Sullivan
24	Oxnard Press Courier	A-3	4	Sullivan
26	Oxnard Press Courier	A-1	26	Duncan
27	Ventura Star-Free Press	A-1	5	Duncan
27	Oxnard Press Courier	A-1	6	Duncan
27	Los Angeles Times	4	7	Duncan
29	Ventura Star-Free Press	A-1	9	Sullivan
29	Ventura Star-Free Press	A-1	9	Duncan
30	Ventura Star-Free Press	A-1	8	Sullivan
31	Ventura Star-Free Press	A-1	19	Danch
7–1959	Los Angeles Examiner	1	2	Sullivan
12	Ventura Star-Free Press	A-1	S-A p. 1	Duncan

Date	Newspaper	Page	Exhibit	Attorney Quoted
12	Ventura Star-Free Press A-1,	A-4	S-A p. 1	Sullivan
12	Ventura Star-Free Press	A-1	S-A p. 1	Henson
12	Ventura Star-Free Press	A-1	S-A p. 1	Danch
13	Ventura Star-Free Press	A-1	A-1	Sullivan
20	Ventura Star-Free Press	A-1	A-3	Henson
29	Oxnard Press Courier	A-1	S-A p. 1	Henson
29	Oxnard Press Courier	A-1	S-A p. 1	Danch
29	Ventura Star-Free Press	A-1	A-4	Sullivan
29	Ventura Star-Free Press	A-1	A-4	Henson
29	Ventura Star-Free Press	A-1	A-4	Danch
2– 2–1959	Ventura Star-Free Press	B-1	A-6	Sullivan
12	Oxnard Press Courier	A-1	S-A p. 8	Sullivan
12	Oxnard Press Courier	A-1	S-A p. 8	Danch
14	Ventura Star-Free Press	A-1	A-7	Sullivan
16	Ventura Star-Free Press	A-2	A-9	Danch
16	Santa Barbara News Press	A-1	A-63	Duncan
17	Ventura Star-Free Press	A-4	A-11	Sullivan
17	Ventura Star-Free Press	A-1	A-11	Duncan
18	Ventura Star-Free Press A-1,	A-3	A-40	Sullivan
19	Ventura Star-Free Press	B-8	A-12	Sullivan
20	Ventura Star-Free Press	A-1	A-13	Sullivan
21	Ventura Star-Free Press	A-1	A-41	Sullivan
24	Ventura Star-Free Press	B-1	A-14	Sullivan
26	Ventura Star-Free Press	A-16	A-16	Duncan
26	Ventura Star-Free Press	A-1	A-16	Sullivan
26	Santa Barbara News Press	A-1	A-19	Duncan

Date	Newspaper	Page	Exhibit	Attorney Quoted
26	Los Angeles Times	32	A-84	Sullivan
27	Ventura Star-Free Press	A-1	A-43	Duncan
27	Ventura Star-Free Press	A-1	A-43	Sullivan
27	Los Angeles Examiner	1	A-62	Danch
27	Los Angeles Examiner	1	A-62	Duncan
3- 2-1959	Santa Barbara News Press	A-7	A-69	Sullivan
3	Ventura Star-Free Press	A-1	A-46	Sullivan
4	Ventura Star-Free Press	A-1	A-23	Sullivan
6	Santa Barbara News Press	A-8	A-20	Duncan
9	Ventura Star-Free Press	A-1	A-49	Sullivan
9	Oxnard Press Courier	A-1	A-86	Sullivan
9	Santa Barbara News Press	A-1	A-72	Sullivan
11	Los Angeles Examiner	1	A-32	Sullivan
16	Santa Barbara News Press	A-1	A-76	Sullivan
17	Ventura Star-Free Press	A-1, A-7	A-37	Duncan
17	Ventura Star-Free Press	A-1	A-37	Sullivan
21	Ventura Star-Free Press	A-1	A-36	Duncan
21	Ventura Star-Free Press	A-1	A-36	Sullivan
21	Oxnard Press Courier	A-1	A-35	Duncan
21	Oxnard Press Courier	A-1	A-35	Sullivan
21	Santa Barbara News Press	A-6	A-80	Duncan
21	Santa Barbara News Press	A-6	A-80	Sullivan
21	Los Angeles Examiner	1	A-34	Duncan
21	Los Angeles Examiner	16	A-34	Sullivan
24	Ventura Star-Free Press	A-1	A-59	Sullivan

APPENDIX "B".

The nature of the reported statements by defense attorneys to newspapers is illustrated by the following excerpts:

"Frank later rapped what he called the political ambitions of the district attorney. 'There was no question that there was political ambition in this,' he said. 'He intends to climb to some higher position over my mother's body.' "

(p. A-1 Ventura Star-Free Press March 21, 1959, Ex. A-36.)

"Frank Duncan was barred yesterday from seeing his mother, Mrs. Elizabeth Duncan, now in county jail awaiting trial. . . .

"Duncan was visibly disappointed and angered by the refusal. He termed it 'extraordinary' and said it was 'uncalled for'. 'There is no justification for it,' he added. 'It smacks of the thumb and the screw—I mean, the rack and the screw.'

"Sullivan told newsmen that the bar to outside visitors would hamper preparation of his case. . . .

"He said he saw the 'handwriting' of District Attorney Roy A. Gustafson behind [Sheriff] Hill's orders yesterday. . . .

"[Duncan] said he had not read anything in any newspaper since last seeing his mother on December 20—six days before she was indicted in the slaying plot . . . to change his opinion of her innocence.

" 'Just because she is accused does not mean she is guilty,' he said. . . .

"Sullivan and Duncan also revealed yesterday that shortly after the 31-year old attorney was born, his mother was in a sanitarium."

(p. A-1, Ventura Star-Free Press, January 12, 1959, Sullivan, Ex. A p. 1.)

"Defense Counsel Sullivan reported he was somewhat startled, when going into the jail to visit his client, to hear the jailer call out the name of a prisoner. 'Gustafson,' the jailer called. 'Gustafson, come here.'

"Sullivan stopped and said: 'Would you mind telling me the first name of that fellow?'

"No, it wasn't Roy A."

(p. B-1 Ventura Star-Free Press, February 24, 1959, Ex. A-14.)

"Frank Duncan leveled this blast at Gustafson: 'There is no question but that he intends to climb to some higher political position over the body of my mother! Never, as a lawyer, did I think I would see such hatred, bias and prejudice in any court in the United States.' "

(p. A-6 Santa Barbara News Press, March 31, 1959, Ex. A-80.)

"Her son Frank .... told the News Press this morning he is sure that the woman charged with killing his young wife is innocent.

" 'After I read the complete Grand Jury transcript,' he said, 'I am fully convinced that my mother is innocent of the charge.' He also said he has 'the greatest concern' that she will not get a fair trial in Ven-

tura County, based on wide publicity given events which have gone before."

(p. A-1 Santa Barbara News Press, February 16, 1959, Ex. A-63.)

"District Attorney Roy Gustafson was accused of 'going a long way' to prejudice any jury that would hear the Duncan murder case.

"The accusation came from Mrs. Elizabeth Duncan's defense attorney, S. Ward Sullivan, who charged that Gustafson's public statements . . . using this case as an argument in favor of capital punishment are a very obvious effort to influence a verdict.

" 'His remarks,' Sullivan said, 'certainly will influence potential jurors in Ventura County. Gustafson is going a long way to see that these defendants do not receive a fair and impartial trial at the hands of an unbiased and unprejudiced jury.' "

(p. A-1 Ventura Star-Free Press, December 30, 1958, Ex. 8.)

"The following statement was handed to reporters by attorney Burt Henson this morning . . . 'One thing that troubles me about this case is the fact that the district attorney appears to be following a course of selective prosecution and selective retribution. It appears as though the district attorney is again deciding who is to be prosecuted and who shall be a target of retribution.' "

(p. A-1 Ventura Star-Free Press, January 29, 1959, Ex. A-4.)

"Mr. Sullivan told the Press Courier just before court convened today that the district attorney has been guil-

ty of prejudicial conduct 'in offering what he knew or should have known was incompetent and irrelevent [*sic*] evidence, entered for the purpose of degrading and debasing my client in the eyes of the jury.'"

(p. A-1 Oxnard Press Courier, March 9, 1959, Ex. A-86.)

"Sullivan who talked for two hours to Mrs. Elizabeth Ann Duncan, 54, today, said tonight:

"'I firmly belief that these two men maintained a bitter grudge toward the Duncan family and they resorted to murder in an attempt to blackmail this poor woman.'"

(p. 1, Los Angeles Times, December 23, 1958, Ex. 31.)

"Sullivan emerged from an hour and a half conference with Mrs. Duncan this afternoon to announce that he is convinced she is not guilty and that he will so plead her.

"He said he is convinced she had nothing to do with her daughter-in-law's disappearance and demise, but that he forsees [*sic*] a long trial, possibly two or three weeks."

(p. A-4 Los Angeles Herald Express, December 22, 1958, Ex. 10.)

"Duncan said . . . 'It's inconceivable that mother could associate with a man like that. It sounded like something that might be done in Chicago—not in Santa Barbara.

"'What a cold-blooded man (Moya). I'd like to lay my hands on that——————————.'"

(p. 1 Los Angeles Examiner, February 27, 1959, Ex. A-62.)

"Sullivan said it appeared to him that Gustafson had done 'a good job in educating the people of Ventura County on his views of capital punishment.'"

(p. A-1 Ventura Star-Free Press, February 18, 1959, Ex. A-40.)

"Said Sullivan: 'This is the clearest case of a miscarriage of justice that I have ever tried in my more than 30 years as a trial lawyer. There is more glaring error in this record than in any case I have ever tried.' . . .

"Of his client he said, 'I don't think she comprehends what happened. All she knows is that she was tried before a biased and prejudicial jury.'"

(p. A-1 Ventura Star-Free Press, March 21, 1959, Ex. A-36.)

"Frank Duncan said he had been reared very carefully by his mother. 'She taught me always to stick up for the under dog, not to hurt anyone, particularly the helpless. She was a very sensitive person—she couldn't stand to see a chicken killed,' he said."

(p. A-1 Ventura Star-Free Press, December 27, 1958, Ex. 5.)

"S. Sullivan, prominent Los Angeles attorney, disclosed that Mrs. Duncan's defense will probably be that she was being blackmailed by Baldonado and Moya."

(p. A-1 Oxnard Press Courier, December 23, 1958, Ex. 25.)

"S. Ward Sullivan, Mrs. Duncan's attorney, said he would 'just as soon' have both Baldonado and Moya plead guilty.

"'We would prefer to go to trial without those two,' Sullivan said."

(p. A-1 Ventura Star-Free Press, January 29, 1959, Ex. A-4.)

"Frank Duncan had bitter comments after court about Moya's conversion. 'He claims to have religion now, yet he told about killing my wife with no more emotion than if he were ordering his lunch,' Frank said.

"He had said earlier it was inconceivable his mother could associate with a man like that."

(p. A-1 Ventura Star-Free Press, February 27, 1959, Ex. A-43.)

"Sullivan said he regards the Duncan case as one of the most interesting he has handled.

"He said his client has consistently stated to him that she is innocent. The main difficulty from a defense standpoint that he sees right now is in impaneling an impartial jury to try her.

"'He feels statements by the District Attorney have seriously prejudiced the average Ventura County citizen against Mrs. Duncan."

(p. B-1 Ventura Star-Free Press, February 2, 1959, Ex. A-6.)

"Young Duncan greeted his mother again in the courtroom and took the opportunity to make several statements to the press. He said for one thing his mother, and other women prisoners in the county jail, are not allowed to read Ventura County newspapers on the belief they would obtain information concerning developments in cases in which they are involved.

"He also branded as 'hogwash' reports that his mother is accumulating a cache of sleeping pills and other drugs in her jail cell as a possible suicide preparation in case the murder trial goes against her."

(p. A-1 Ventura Star-Free Press, February 17, 1959, Ex. A-11.)

"Frank Duncan told reporters after the session that he did not learn of the phony annulment until many weeks after it was granted."

(p. A-16 Ventura Star-Free Press, February 26, 1959, Ex. A-16.)

"S. Ward Sullivan, vetgran criminal lawyer, said today he will enter a plea of 'not guilty' for Mrs. Elizabeth Duncan . . . 'She denies having any part of the killing of Olga Duncan,' Sullivan said.

"He said she admitted having met both Augustine Baldonado and Luis Moya who are believed to have committed the actual killing. . . .

"Sullivan said that 'she feels someone else is trying to involve her in the murder.' . . .

"Asked what the feeling was between the two women, the son's wife and the mother-in-law, Sullivan said that there was no indication of hatred on the part of Mrs. Duncan. 'She has told me however, that there was no love lost between them."

(p. A-1 Ventura Star-Free Press, December 22, 1958, Ex. 3.)

"The Los Angeles attorney said there are a great number of facts in the matter which have not as yet been presented and which he feels will place a new light on the whole proceedings. . . .

"Sullivan said his client is maintaining a calm attitude outwardly but that she has obviously been hard-hit by the aspects of the charges against her. 'She has lost 12 pounds since being placed in custody.' Sullivan said. 'She would, of course, rather be spending her holiday season with her son and friends than in jail.'"

(p. A-1 Ventura Star-Free Press, December 24, 1958, Ex. 17.)

"Sullivan has told reporters one of his arguments will be that all of the testimony against Mrs. Duncan is from people who were admitted accomplices in the crime of murder, and that the law requires independent, corroborative evidence from people who were not directly involved."

(p. A-1 Ventura Star-Free Press, February 27, 1959, Ex. A-43.)

"Sullivan contends all who have testified to details of the alleged murder scheme up to now have branded themselves accomplices by their own testimony."

(p. A-1 Ventura Star-Free Press, March 3, 1959, Ex. A-46.)

"Earlier, Mrs. Duncan's attorney, S. Ward Sullivan, said he will demand a mistrial in the four-week-old trial, citing what he called 'misconduct of the district attorney.' . . . '[H]e knows the jury cannot exclude these matters from their minds,' Sullivan said."

(p. A-1 Ventura Star-Free Press, March 9, 1959, Ex. A-49.)

"Young Duncan refused to say what he thought about his mother's involvement. . . .

"'My mother would have to be insane to be linked into this . . .' he said."

(p. A-1 Oxnard Press Courier, December 26, 1958, Ex. 26.)

"Sullivan said later he had talked to her [Mrs. Duncan] about the verdict. . . .

"'She isn't surprised at the verdict,' he said, 'because she realizes she had to go to trial before a jury that was already biased and prejudiced, and she couldn't expect anything else from the outset of the trial.'"

(p. A-6 Santa Barbara News Press, March 21, 1959, Ex. A-80.)

"John Danch, Ventura attorney for Baldonado, said he expects the trial to take at least two weeks. He hopes the three defendants will be tried together, but anticipates Mrs. Elizabeth Duncan's attorney, S. Ward Sullivan, may seek a separate trial for his client.

"Danch says he feels it may be difficult to obtain an impartial jury in Ventura County."

(p. A-1 Ventura Star-Free Press, December 31, 1958, Ex. 19.)

"Sullivan said today Mrs. Duncan definitely will take the stand to testify in her own behalf, when the defense presents its case. Under the law, she cannot be required to do so."

(p. A-1 Ventura Star-Free Press, February 26, 1959, Ex. A-16.)

"Baldonado's attorney, John Danch, Ventura, said he plans to advise the former Camarillo resident against making any admissions in the Duncan trial starting today."

(p. A-2 Ventura Star-Free Press, February 16, 1959, Ex. A-9.)

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Office-Supreme Court, U.S.
FILED
MAY 4 1961
JAMES R. BROWNING, Clerk

PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 185

AUGUSTINE BALDONADO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

Introduction

The issue before this Court is whether the petitioner could have received a fair penalty trial in Ventura County in view of the conduct of the District Attorney and the resulting publicity. We have argued that the intentional dissemination of statements to the press, which were published and widely circulated in the county, constituted a calculated interference by a high law enforcement official of the State of California with the petitioner's penalty trial. In enacting the change of venue procedure set forth in its Penal Code, the State of California has provided a means by which the defense may mitigate the popular prejudice aroused by such interference. If the District Attorney's views were transmitted to his official staff only and were

not elsewhere published in Ventura County, there could be no argument that the petitioner could not receive a fair and impartial trial.

It is the interaction of the District Attorney and the press—causing or contributing to the formation of community attitudes prior to trial—which creates the prejudice.

There is a good deal of confusion implicit in respondent's assertion that "The Alleged Failure of the State to Supply a 'Corrective Process' Is Not an Issue Before This Court" (Resp. Br. p. 30). The corrective process under discussion is changing the venue of the petitioner's penalty trial. We would not be here if the State had changed the venue of this trial, for if the petitioner had been tried in a different county, the statements of the District Attorney would not have commanded the same prestige as in his own county. It may be parenthetically noted that since the trial the District Attorney has run for judicial office. Also, it is unimportant that the petitioner failed to renew his motion since such an act would have been idle.[1] It is unimportant whether the violation of due process technically consists of (a) permitting a penalty trial to be held in a prejudicial atmosphere engendered by the District Attorney's views;

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[1] After asserting that the propriety of the trial court's ruling on venue change is not in issue before this Court, Respondent goes on to state that the trial court's ruling was without prejudice to the renewal of the motion and the motion was not renewed. The Petitioner replies that the renewal of the motion would have been an idle act because of the trial judge's remarks in denying the first motion: "It is a sad commentary on the integrity, decency and humanity of the people of Ventura County to say that defendants, whose very lives may be at stake, cannot receive a fair and impartial trial in this County" (R. 77). It need scarcely be mentioned that the same trial judge who had presided over the trial of Mrs. Duncan but three weeks prior to the penalty trial of petitioner and had made the above quoted statement, would hardly have been likely to reverse himself and subsequently grant the motion.

or (b) denying a motion for change of venue based upon the same views of the District Attorney. In either case there is a denial of due process.

II.

The Rigid Test Proposed by Respondent for Showing Denial of Due Process on Account of Pre-Trial Publicity Does Not Provide Reasonable Guarantees for a Fair Trial.

Our concern with pre-trial publicity is grounded upon the notion that individuals are influenced by publicity, expressed attitudes of government officials, and the mood of their social group or unit. Such influences are often subtle and not within the conscious awareness of the individual. We wish to make it clear that we are not advocating that the problem of pre-trial publicity must necessarily be decided by social scientific literature, experiments and findings. But we do unequivocally state that these notions are beyond dispute and that an intelligent solution of the problem must be cognizant of them. The argument by the Attorney General, despite being learned in certain aspects of the law, might have been written in the early 19th century for all its apprehension of current sociological and psychological insights.

A bare bones comparison of our arguments versus those of the State may clarify what each of us is really contending. We contend that: (1) the District Attorney's statements of December 22 and December 30, 1958 were inflammatory, unintentionally made by an instrumentality of the State, and tended to prejudice any trial which might be held in Ventura County; (2) the resulting prejudicial effects may have been subtle, and that existing methods of examining prospective jurors are hardly able to discover such effects; and, (3) therefore, in view of the deliberate nature of the conduct and the consequent difficulties

in proving their effect—it is prudent and conservative to resolve the doubts in favor of the aggrieved person.

The Attorney General, apparently regarding our argument as a challenge, has taken an extreme position: (1) the general theme of the argument is to concede that the statements were prejudicial—the principal counter being that the District Attorney would have been able to make his views known at the outset of the penalty trial;[2] (2) prejudicial pre-trial publicity, no matter how aggravated cannot be the basis for error unless there is scientific demonstration that the jury was prejudiced; and (3) he has devised a rigorous formula (see Resp. Br. pp. 10, 11, especially footnote) requiring that this Court, in order to reverse, must first conclude that every person who might have read the statements would necessarily have been prejudiced by them. In fairness to the Attorney General it should be mentioned that the formula's point of departure is that all jurors in the instant case *said* they could lay aside preconceptions, or that they had no preconceptions. Apparently it makes no difference how evil the prejudicial influence might be so long as 12 people will take an oath that they have open minds, or will re-open their minds for purposes of the trial.

We submit that this position is untenable as an argument in this case and, more important, it is unacceptable as a legal principle for generic application to similar problems, for, if we correctly perceive the Attorney General's argument, mob domination, publication of false confessions or factual inaccuracies could not possibly be grounds for relief, providing 12 persons say the magic words.

Respondent does not rest after demanding that the foregoing formula disposes of the case. The brief states that

[2] But query, if he could have argued the question prior to the presentation of evidence?

even if that formula is satisfied, petitioner is still not entitled to relief because there is no showing that any juror read the offending statements. The difficulties in proof mentioned with reference to the Attorney General's "formula" are equally applicable here. One of the goals of mass media campaigns is to create an "accepting" public mood or atmosphere for an idea or product. We as individuals usually cannot pinpoint a time and place at which we first came under the dominion of a particular idea or attitude. As we previously noted, intelligent people living in the second half of the 20th century are aware of the subtlety of unconscious influence. Yet the Attorney General would throw all of this awareness out of the window and cling to a crude mechanical test.

A specific instance of the Attorney General's theory is noted where he argues that since the record contains no evidence to show that any juror acted unfairly, any conclusion that a juror did so act must necessarily be based on the premise that because of the newspaper publications, a juror could not act fairly (Resp. Br. p. 9). Apparently the inference of this argument is that unless petitioner can demonstrate the inevitability that the newspaper reports caused prejudice, he has no case. No authority is cited for such a proposition.

As noted above, we contend that the statements were prejudicial, or may well have caused prejudice, and therefore some corrective process, such as change of venue, should have been applied. The Attorney General states, "you must *demonstrate* the prejudicial effect by producing a 'biased' juror, or show that the statements must have prejudiced all jurors."

Two other areas of procedural due process are instructive, coerced confessions and denial of right to counsel.

(See *Stroble* v. *California*, 343 U.S. 181, 190; *Powell* v. *Alabama*, 287 U.S. 45.)

If the courts were to follow the Attorney General's logic in those areas, strong proof that a defendant whose confession was coerced had committed the crime would be a basis for denying relief based on coercion. And, again, in the case where a defendant is denied counsel in a capital case—clear proof of guilt would be a basis for denying relief.

We believe that an important factor in these categories of due process is to inform the State that certain forms of conducting criminal prosecutions will not be tolerated. As long as public prosecutors are free to try their cases in the press, and then confidently sit back and say, "bring me a juror whose mind has been poisoned—*and says so*," such conduct will continue.

The Attorney General reiterates this same theme several times. He says that the first question before this Court is "whether each and every person reading the newspaper articles . . . would necessarily be of such frame of mind that he could not fairly and impartially determine . . ." He then suggests that this Court should undertake a subjective test. No authority is cited for this phase of the argument. Such argument ignores modern sociology and psychology and is not supported by legal authority.

III.

Other Contentions of Respondent Are Without Merit.

A. We believe a critical aspect of this case is that the District Attorney did, in fact, make certain inflammatory statements. The fact that an officer of the court engaged in trying his case outside of the courtroom ought to be offensive to due process. The Attorney General now con-

tends that there is nothing in the record to show that the District Attorney made any statements (Resp. Br. pp. 7, 8). He insinuates that petitioner's evidence in this regard is the "rankest kind of hearsay."

In California an application for removal is decided from the affidavits and counter-affidavits presented in support of and in opposition to the application.[3] In the case at bar the petitioner's motion to remove was supported by affidavits which squarely placed in issue the prejudice alleged to have been caused by the District Attorney's published statements. Whether such statements were published—and whether they are accurate reproductions of what the District Attorney actually said—was placed in issue by the filing of counter-affidavits by the prosecution. Among other things the counter-affidavits (1) denied making a particular statement[4] (R. 10); (2) admitted making another statement (R. 9); and denied making a one-sentence remark which is part of a lengthy interview which includes many remarks and attributions (R. 16; Pet. Br., App. 8).

In our view the two most egregious instances of statements attributed to the District Attorney are contained in Appendices "A" and "B" to the brief for petitioner. These

[3] In *People* v. *Yoakum*, 53 Cal. 566 (1879), the court stated:

"It is stated in these affidavits that there exists throughout the county a general feeling that he is guilty of the murder charged in the indictment. Nor is the truth of any of these statements denied by the prosecution. No counter affidavit was offered by the State. So far as the record shows, it was not even pretended below, upon the part of the People, that the statements contained in the moving affidavits were untrue or mistaken in any respect.

"In the condition of the public mind in Kern County, as established by the affidavits on file, the prisoner could not have a fair trial of the case" (p. 570).

[4] Petitioner's brief makes no reference to and does not rely upon this statement.

appendices take the form of newspaper articles, each of which was an exhibit to petitioner's affidavit in support of removal.

Appendix "A" consists of a lengthy front page statement of the District Attorney and a lead front page newspaper article in which various remarks are attributed to the District Attorney. The District Attorney actually admits making the statement in a counter-affidavit in opposition to the motion for removal (R. 9). The District Attorney did not, by way of counter-affidavit, deny making any of the remarks attributed to him in the lead article.

Appendix "B" consists of an interview with the District Attorney. Of the 207 line columnar lines in this interview, the District Attorney does deny, by way of counter-affidavit, making the following remark: "Gustafson says Moya was using marijuana when he was arrested in the Duncan murder case" (R. 16).

However, before the California Supreme Court the District Attorney denied making a certain statement attributed to him in the lead newspaper article contained in Appendix "A" (Rep. Tr. of Oral Argument, p. 24, lines 13-19). The District Attorney also denied that he made any statement regarding the guilt of any of the defendants (*ibid.*, p. 20, lines 3-4). There is also an equivocal denial concerning the interview set forth in Appendix "A" (*ibid.*, p. 26, lines 11-26; page 27, line 1).

We are astonished by the Attorney General's reliance on the argument that the District Attorney did not make the statements attributed to him and we supply reasons as follows:

(1) The District Attorney attempted to correct the impression that the statements attributed to him in the interview were made by him. Aeually, he admits making the

interview (*ibid.*, p. 26, line 17), but denies giving the interview in connection with petitioner's case. He says that it is simply an interview dealing generally with the desirability of retaining the death penalty. He admits, on questioning by Mr. Justice Peters that, so far as the record is concerned, this is the first denial of the interview (*ibid.*, p. 26, lines 23-26; p. 27, line 1). Mr. Justice Peters states, "I think it is highly improper to refer to matters outside the record" (*ibid.*, p. 27, lines 8-9).

(2) The District Attorney purported to explain in oral argument before the California Supreme Court why he did not deny making the statements at the time of the hearing on the motion to change venue. He says that he is more often misquoted than properly quoted (*ibid.*, p. 25, lines 5-6). He also asserts that he was not even aware that some of the petitioner's newspaper exhibits were printed (*ibid.*, lines 8-11).[5] With reference to his explanation that he did not see many of these newspapers—he *admits* that he was aware of the interview printed in Appendix "B," and he also admits making the statement attributed to him in Appendix "A." We presume that he was aware of the lead article which appeared in the same newspaper on the same page as the statement which he admits having made.

(3) Perhaps the most telling feature of the District Attorney's tardy denials is that the District Attorney filed a counter-affidavit and denied making one remark contained in the interview set forth in Appendix "B" (R. 16). If he bothered to deny the statement that co-petitioner Moya was using marijuana, we must ask why he did not deny making other statements contained in that interview, for he obviously had the opportunity to do so. It follows that, by his failure to deny the remainder of the interview he

[5] Query, why he did not seek a retraction of the alleged misquotes.

has admitted making the other remarks attributed to him in the interview.

The psychology of the District Attorney is best shown by the following statement:

> "In the first place, let me say this: that I sincerely regret that I ever said anything outside of the courtroom during the whole course of this trial; and I regret it not because I think I said anything wrong at any time, not because I think that whatever I said may have had any prejudicial effect on any prospective jurors, but simply because it has given rise to this point that is now being urged here and was urged in the trial court on motion for change of venue" (Rep. Tr. of Oral Arg., p. 24, lines 2-10).

The importance of whether the District Attorney actually made these statements was recognized by Justice Peters at the oral argument:

> "Mr. Justice Peters: Counsel, isn't it one thing for the newspapers to report the facts and circumstances and opinion about the guilt or innocence of a person, and quite another for the District Attorney, the prosecuting official in the county, to make such statements and to be quoted as to such statements?" (*ibid.*, p. 19, lines 19-24).

We submit that where a high law enforcement official makes statements which are published in the press, then the courts have a far greater latitude and power in controlling such conduct by appropriate measures than if newspapers, or other mass media, attributed statements to public officials which have not in fact been made by them. This theme is, we trust, present throughout our brief.

The Attorney General states "the District Attorney did not file an affidavit denying the making of those statements (among those attributed to him in the newspaper exhibits) which were in fact not made by him" (Resp. Br. p. 7). Apparently this statement is made to explain why the District Attorney did not file an affidavit denying that he made the statement which was published on December 30, 1958. It should be noted that the respondent's statement is carefully qualified so as to refer only to "newspaper *exhibits*." The Henson affidavit (R. 44) attributed, on information and belief, a certain statement to the District Attorney as having been published on December 27, 1958. No exhibit was attached. The District Attorney denied the making of this statement (R. 10). This denial is inconsistent with the Attorney General's present contention that whether or not the statements were in fact made by the District Attorney was not an issue in the venue proceeding, or that the proceeding was conducted on the assumption that the prosecutor's participation was not in issue. The point is that when the matter first came up in a judicial proceeding the District Attorney made a careful effort to explain and weaken the contentions made in the Henson affidavit. At such time he did not deny making the statement published on December 30. Later, in what appeared to be an off-hand manner, before the State Supreme Court, he denied making a portion of the December 30 statement. The statement or inference in Respondent's Brief that he did not deny statements which were not made by him is inaccurate and misleading.

B. In arguing that the statement of December 22 was not prejudicial to petitioner, the Attorney General says that the petitioner was not then under arrest for nor charged with the murder. While such statement is technically correct, it is misleading because the petitioner was

under arrest and was under heavy suspicion in connection with the murder.

C. The Attorney General, beginning at page 27, paints a picture of censorship. He states that if our position is accepted, a "large step in the indirect censorship of the press will have been taken." He says that officials will conceal all information from the press. He says that California will be forced to change its laws regarding publication of Grand Jury hearings. None of these things follow from the adjudication being sought here. We are not seeking the adoption of the English rule, but have limited the question to publicity engendered by the prosecutor.

Respondent suggests that many "criminals are located through news items." Again the adjudication we seek would not be detrimental to amateur sleuthing, and it should not be necessary to say that the right to freedom of thought and expression, of which the right to a free press is an aspect, flows from more fundamental strata than such activity. He also says that such an adjudication would forbid the publication of facts about the most "interesting," "significant," and "important" criminal cases in the country (Resp. Br. pp. 27, 28). We, of course, contend that the District Attorney's remarks, while "interesting" and "significant," ought not to have a social value sufficient to warrant an infringement of the right to a fair trial.

The underlying policy considerations in this case are not those involving the integrity of the press. Rather, they concern a pragmatic determination of whether a jury trial as we know it is compatible with modern methods of swaying and controlling public opinion. We have no answer to the ultimate problem of fair trial versus free press. We do, however, contend that the issue before this Court —interference by a public prosecutor—can be solved with-

out a commitment on the solution of the ultimate problem. We hesitate to mention the cliche that law cases are decided one at a time.

Conclusion

It is respectfully submitted that the judgment below be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

Nos. 185, 186 AND 187.—OCTOBER TERM, 1960.

Augustine Baldonado, Petitioner,		
185	*v.*	
State of California.		
Luis Estrada Moya, Petitioner,		On Writs of Certiorari to the Supreme Court of California.
186	*v.*	
State of California.		
Elizabeth Ann Duncan, Petitioner,		
187	*v.*	
State of California.		

[May 22, 1961.]

PER CURIAM.

After hearing oral argument and on due examination of the record, we conclude that the totality of circumstances disclosed fails to support the substantial due process issues tendered in the petition for certiorari, and so we dismiss the writ.